Supreme Court, U.S.
FILED

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No. _____

IN THE

Supreme Court of the United States

October Term, 1996

KATHERINE HINE,
Petitioner,

v

STATE OF OKLAHOMA EX REL.
OKLAHOMA BAR ASSOCIATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OKLAHOMA

PETITION FOR WRIT OF CERTIORARI

Counsel of Record:
HELEN L. MCGONIGLE
Attorney at law
P.O. Box 326
24 Meadowview
Brookfield, CT. 06804-0326
(203)740-0074

On the Petition:
ALAN W. SCHEFLIN
Professor of Law
University of Santa Clara
3045 21st Avenue
San Francisco, Ca. 94132
(415)665-6469

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the First Amendment's speech, expression, and petitioning clauses prohibit a state from disciplining a lawyer under a rule prohibiting "conduct that is prejudicial to the administration of justice" who joins as a private citizen in a good faith letter of concern to a trial judge about the inadequacy of protections being provided to an abused child whose custody is being litigated in a public bench trial, when the trial judge testified he was not prejudiced by the letter.

2. Whether a state may presume a potential for prejudice to a civil bench trial, so as to provide a sufficiently compelling governmental interest to justify the state in sanctioning core petitioning activities of drafting, circulating and presenting a good faith, fact-based letter to a court on issues of public concern, as to the lawyer signer only, without chilling constitutionally protected First Amendment rights and denying the sanctioned attorney, Fourteenth Amendment Equal Protection rights.

3. Whether the Due Process Clause of the Fourteenth Amendment is offended by a state Supreme Court decision retroactively punishing a lawyer for speech not expressly prohibited by the language of its rule proscribing conduct that "is prejudicial to the administration of justice" but which becomes sanctionable only by reason of the State Court's first impression extension of the rule to include speech allegedly creating a "reasonable likelihood" of material prejudice to a pending public civil bench trial.

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OPINIONS BELOW

The Supreme Court of Oklahoma has issued an opinion in this case, a copy of which appears in Appendix A to this Petition, at pages 1a-11a. The opinion has been reported at page 1462 of The Oklahoma Bar Journal, Vol. 68, No. 17, published 4/26/97. The Trial Panel Report of the Professional Responsibility Tribunal, the text of which appears in Appendix B to this Petition, lists various findings of the original trier and notes petitioner's having raised the Federal Constitutional issues.

STATEMENT OF JURISDICTIONAL BASIS

The judgment and opinion of the Supreme Court of Oklahoma was entered on April 22, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND REGULATIONS INVOLVED

This case involves Oklahoma's Rule of Professional Conduct 8.4(d) and 3.6(d)(6), 5 Ok. Statues 1991, Ch. 1 App. 3-A, and the First and Fourteenth Amendments to the United States Constitution, all of which are reproduced at Appendix G.

STATEMENT OF THE CASE

Petitioner Hine, an Oklahoma attorney who frequently tries cases involving child abuse, and who was also a citizen member of the child advocacy group SCAN (Stop Child Abuse Now), signed and sent a letter [App. C] to an Oklahoma trial judge during the pendency of a child custody proceeding. [App A, p.2a] The letter was on SCAN letterhead, signed by Hine and eight other SCAN members, and although one of the telephone numbers listed on the letterhead was Hine's, there was no designation in the letter or on the letterhead that Hine was an attorney. [App A, pp. 2a-3a] Neither Hine nor any of the signatories to the letter were individuals previously known to the trial judge. [App. E pp.1e-3e]

Prior to the sending of the letter, the grandmother and father of one of the allegedly abused children referred to in the letter, had contacted SCAN and over a period of time, they and their attorney had informed petitioner that one county agency had improperly interviewed the child and another agency had disregarded the trial judge's supervised visitation order. No attorney-client relationship was ever established or alleged to have been established between the petitioner and any individual involved in the custody proceeding concerning the child. [App A, p 2a.] The proceeding was open to the public and there is no evidence in the record below that a gag order had ever been imposed.

The evidence was unrefuted that the trial judge and the respective attorneys for both parents received copies of the letter on the morning of September 22, 1995. [App A, p. 11a ftnt.22] There were no other attorneys in the case, as the child had no attorney, court appointed special advocate, or guardian *ad litem*. [App E, p. 7e]

Respondent Bar Association filed a formal Complaint against Hine on February 26, 1996, alleging, among other things

that Hine engaged in "conduct that is prejudicial to the administration of justice", to which she filed a March 21, 1996 Response setting forth affirmative defenses under the First and Fourteenth Amendments. [App D]

Testimony was taken before a Professional Responsibility Tribunal on June 19, 1996 and the Trial Panel made findings that the trial judge "was not prejudiced by the SCAN letter" and that Hine "had a good faith belief in the truth of the statements contained in the SCAN letter". [App B, p. 3b] Neither finding was refuted by the Oklahoma Supreme Court in its *de novo* review of the Trial Panel Report.

The federal constitutional issues Hine raised in her Response were developed during testimony and argued at the close of such testimony [App E] but were held by the Trial Panel to be beyond its purview. [App B]

The First and Fourteenth Amendment issues Hine raises now and had raised previously before the Trial Panel [App. E] were also raised in her Brief to the Supreme Court of Oklahoma. [App F] Hine produced unrefuted evidence at trial that judges are under virulent public attack due to perceived insensitivities or to perceived inadequacies in training, particularly in child abuse cases. Hine also testified that she was concerned about such public attacks and hoped that SCAN's ability to provide current literature and other information about child abuse and the functioning or lack of functioning of the child protection system would defuse some of the attacks. [App. E, pp. 12e-13e] Testimony from a child advocate about attorney fear of bar discipline chilling attorney participation in law reform child advocacy organizations to the detriment of such organizations and of children, [App E, p. 9e] was unrefuted.

Hine's Brief to the Oklahoma Supreme Court advanced the following basic arguments: (1) that Rule 8.4(d) is impermissibly vague as applied to the SCAN letter, especially in light of

Oklahoma RPC # 3.6(d)(6) and other legal authorities, including child abuse reporting legislation, which appear to specifically permit an attorney to disseminate the kind of information contained in the SCAN letter, causing Hine to reasonably believe her conduct fell within Rule 3.6's "Safe Harbor" and other provisions of law; (2) that she could not have violated Rule 8.4(d) because the express language of the Rule requires conduct that "is prejudicial to the interests of justice" [emphasis supplied] and it is unrefuted that no actual prejudice resulted; (3) that even had there been an ongoing criminal jury trial, Rule 8.4(d) could not have been applied to Hine's speech consistently with then existing interpretations of the First Amendment, unless the letter was proven to have posed at least a "substantial likelihood of material prejudice", if not a "clear and present danger"; and (4) that to apply Rule 8.4(d) using a standard any broader than the "substantial likelihood" or the "clear and present danger" standards to petitioner's letter would subject all manner of protected speech to disciplinary sanction. [App. F]

The Supreme Court of Oklahoma opinion below stated that the court "has not previously circumscribed the reach of Rule 8.4(d)". The opinion extended the coverage of Rule 8.4(d) to conduct that posed a "reasonable likelihood of material prejudice" to the administration of justice, noted the absence of any prejudice to the underlying custody trial, and declined to make any constitutional analysis on the theory that Hine's right to disseminate the information contained in the letter to the news media was irrelevant to whether she had the right to disseminate the information to the trial judge. The Oklahoma court then imposed a public reprimand. [App. A]

REASONS FOR GRANTING WRIT

I. CERTIORARI IS NECESSARY TO SETTLE CONFLICTS AMONG DECISIONS OF OTHER STATE COURTS OF LAST RESORT

A. *This Court's Ruling is Needed to Resolve Widely Divergent Opinions Concerning the Type of Notice Mandated by the First and Fourteenth Amendments when State Courts Interpret Lawyer Disciplinary Rules Regulating Speech*

This is a case involving speech by an attorney purely in her capacity as a private citizen [App A, p. 5a, App. C], critical of certain government agencies, but not the judiciary, speech admittedly for "altruistic motives" [App A. p. 8a] that had caused no prejudice to the ongoing child custody court trial. [App A, ftnt. 22] The speech in question consisted exclusively of the core First Amendment activities of drafting, circulating, and presenting a letter [App. C] seeking redress of grievances on behalf of those members of the public concerned about the safety of children. No other conduct, e.g. press conferences or picketing, was involved. The Oklahoma Supreme Court's complete avoidance of all federal constitutional issues in a State disciplinary proceeding seeking to sanction an attorney citizen purportedly for speech "that is prejudicial to the administration of justice", and extending the coverage of the rule beyond its literal meaning to speech posing a "reasonable likelihood of material prejudice" [App A p.6a & 7a], conflicts sharply with the constitutional standards adopted and applied by the Supreme Court of New Jersey to identical language. *In Re Hinds* 449 A2d 483 (N.J. 1982).

The New Jersey proceeding differed from the Oklahoma proceeding in that the former involved media speech addressing an ongoing criminal jury trial, the content of the speech was clearly insulting to the court, and it was uttered by a lawyer who was

arguably a trial participant. The New Jersey Court noted that the "conduct that is prejudicial" rule is rarely, if ever, used alone[1] and is limited to "situations involving conduct flagrantly violative of accepted professional norms." [*Hinds* at p. 498].[2] The *Hinds* court further noted that the language of the rule "gives the appearance of an aspirational standard, rather than a disciplinary rule" [p. 497] and that, while not necessarily unconstitutional, the rule was "redundant" and would likely be abolished under the Model Rules. [p. 498, ftnt. 8] One of the few sources of interpretive guidance to understanding the meaning of Oklahoma's Rule 8.4(d) is in its official comments, which attempt to explain Rule 8.4(d) conduct as being criminal or at least of questionable moral turpitude.[3]

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[1] A search of Oklahoma decisions reveals no other reported decision in which lawyer discipline has been imposed based on violation of Rule 8.4(d) without the existence of a criminal infraction or the violation of a disciplinary rule other than 8.4(d). A state's failure to establish any other violation creates an obvious notice problem because of 8.4(d)'s broad and general terms.

[2] Clearly abusive language that is a mere sham [*Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S.127(1961)] or knowingly false speech [*New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)] can be of such a nature as to receive diminished or non-existent First Amendment protections.

[3] The official comment to Rule 8.4(d) reads in pertinent part as follows:

> "Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving 'moral turpitude.' That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, *a lawyer should be professionally*

In *Matter of Keller*, 693 P2d 1211 (Mont. 1984) the Supreme Court of Montana, while acknowledging that First Amendment attorney speech rights can be limited if in direct conflict with Sixth Amendment rights to a fair trial in a criminal case, held that *all* of its disciplinary rules restricting attorney speech were violative of the First Amendment because none gave advance notice of any "clear standard by which attorneys can gauge their conduct". [*Keller*, p. 1214] The *Hinds* court likewise declined to apply the New Jersey equivalent of Rule 8.4(d) retroactively where the Court's opinion itself constituted "the first opportunity we have had to define the proper scope of" the rule. [*Hinds*, p.500] The Supreme Court of Oklahoma opinion below also conceded its failure to have "previously circumscribed the reach of Rule 8.4(d)" [App. A. p. 5a] but offered no explanation for the fact that such failure provided Oklahoma attorneys such as petitioner, with no prior notice of what speech or *whose* speech the rule prohibited.

Petitioner had no advance notice that she had lost the right to petition government in the same manner as other citizens, or that her conduct might be gauged under a "reasonable likelihood" standard. Compounding the notice and retroactive application

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answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty or breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

A lawyer may refuse to comply with an obligation imposed by law upon good faith belief that no valid obligation exists. The provisions of Rule 1.2(c) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law." [Emphasis supplied]

problems, the Oklahoma opinion also introduced novel and unspecified standards of conduct purportedly contained in the Eugene R. Gaetke article, *Lawyers as Officers of the Court*, 42 Vand. L. Rev. 39, 51-56, referenced in Ftnt. 20 of its opinion.[4]

B. This Court's Guidance is Needed to Clarify the Extent to which State Courts May Consider the Identity or Role of the Speaker in Assessing whether the First and Fourteenth Amendments Permit Sanctioning Speech for the Stated Purpose of Preserving Fair Trial Rights.

The *Hinds* court reasoned that since the "conduct that is prejudicial" rule applies "when the attorney is not particularly or specially connected with" the pending proceeding, [p.498], such an attorney "would seemingly enjoy the same free speech rights as any other citizen" [pp. 498-499]. The Oklahoma Supreme Court just nine years earlier had appeared very sensitive to the obvious equal protection problems inherent in sanctioning attorneys when other citizens may not be, and voiced its concern

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[4] Ironically, at p. 52 of the article, included in a listing of desired affirmative ethical considerations for lawyers seeking to fulfill their obligations as officers of the court is a suggested requirement that

> "[a] lawyer must disclose any information indicating that a person other than a client has perpetrated a fraud upon a tribunal."

Clearly the fact that the Oklahoma trial judge's order of supervised visitation was being interpreted to mean that the court ordered supervisor could leave the room during the visitation, in light of the unrefuted expert testimony that the child had been damaged by the lack of supervision [App. E, pp. 12e-13e], was a matter that petitioner had every reason to believe was a fraud upon the tribunal about which the trial court should have been advised. Advising the trial Court specifically about such fraud was core petitioning activity protected by the First Amendment. The trial judge also admitted in his testimony that this was the sort of information that was important for him to have. [App E, p. 6e].

about the Oklahoma Bar Association's attempts at that time to prohibit

> "a certain class of citizens, attorneys, from speaking on certain subjects, criticism of the judiciary. This concern with limiting what subjects may be spoken to by which speakers is absolutely inimical to the principles of the First Amendment. In the realm of protected speech, *the government is constitutionally disqualified from dictating* the subject about *which persons may speak* and the speakers who may address a public issue." [Emphasis supplied][citations omitted] *State ex rel. Okl. Bar Assn. v. Porter*, 766 P2d 958,967 (1988)

The only possibility of prejudice ever mentioned by the Oklahoma court below arose out of its speculation about the alleged forseeability of Judge Lee recusing. There was no proof whatever that the fact that petitioner was one of the signers made the letter prejudicial in any different manner than it would have been with only the other eight names. In order to sanction petitioner exclusively, it was the State's burden to establish not only the existence of a compelling state interest requiring Hine's speech and petitioning in this instance to be treated differently than that of other citizen signers, but that the Rule 8.4(d) sanction was "no greater than is necessary or essential to the protection of the particular governmental interest involved". *Procunier v. Martinez*, 416 U.S. 396, 413 (1974).

The *Hinds* court further held that in order not to violate significant First Amendment rights, the standard that should be invoked in applying an 8.4(d) type disciplinary rule to the speech of a non-advocate attorney should be that of "clear and present danger" or "serious and imminent threat". [*Hinds*, p. 499] *See also*

In Re Rachmiel, 449 A2d 505 (N.J. 1982) (reasonable likelihood standard overly broad for First Amendment purposes as applied to an 8.4(d) type disciplinary rule). The Oklahoma Supreme Court below made no attempt at constitutional analysis and thus failed to make any differentiation between the varying potentials of prejudice to criminal versus civil, or to jury versus non-jury trials. The Oklahoma court offered no justification for not only extending the rule beyond its plain language but also then applying it *retroactively* to the petitioner.

The Supreme Court of Oklahoma's refusal to recognize the existence of legitimate First Amendment issues appears to rest in part on its misconception that attorney speech not reaching the media is constitutionally unprotected. [App. A, p. 6a] Not only is the speech of citizens consisting of core petitioning activity entitled to First Amendment protection, it is entitled to no less First Amendment protection than are the more general forms of expression of speech and press. *Cate v. Oldham*, 450 So2d 224 (Fla. 1984). [5]

C. The Widely Divergent State Standards Employed in Assessing the Impact of Good Faith Political or Petitioning Speech upon Pending Litigation, Raises Serious First Amendment Issues.

State as well as federal courts, in assessing attorney speech as prejudicial to fair trial rights, use at least four different standards, i.e. the clear and present danger test, the serious and

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[5] *See also McDonald v. Smith*, 472 U.S. 479 (1985); *Western Nat'l Mut. Ins. Co. v. Lennes* (In re Workers' Compensation Refund) 46 F3d 813 (8th Cir.1995); *Re IBP Confidential Business Documents Litigation*, 800 F2d 787 (8th Cir. 1986).

imminent threat test, the substantial likelihood of prejudice test, and the reasonable likelihood of prejudice test.[6]

The Supreme Court of West Virginia, in reviewing discipline of attorney speech publicly insulting to the judiciary, but not clearly false, concluded that

> "the Free Speech Clause of the First Amendment protects a lawyer's criticism of the legal system and its judges, . . . a lawyer's speech that presents a *serious and imminent threat* to the fairness and integrity of the judicial system is not protected. It is apparent that when a personal attack is made upon a judge or other court official, such speech is not protected if it consists of knowingly false statements or false statements made with a reckless disregard of the truth. . . . and that statements that are outside of any community concern, and are merely designed to ridicule or exhibit contumacy toward the legal system may not enjoy First Amendment protection." *Committee on Legal Ethics v.Douglas*, 370 SE2d 325, 326-327 (W. Va. 1988)[7]

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[6] The potential chilling effect on attorney speech is exacerbated by the increasing mobility of lawyers who may practice in several jurisdictions, each with different standards.

[7] Out of a probable concern that the First Amendment may require it, at least six states already espouse some version of the clear and present danger test as applicable to public attorney speech alleged in disciplinary proceedings to threaten the administration of justice. *See* Berkowitz-Caballero, *In the Aftermath of Gentile: Reconsidering the Efficacy of Trial Publicity Rules*; 68 N.Y.U.L. Rev. 494, 543 Ftnts. 282 & 283 (1994)

[Emphasis supplied]

The decision of the Supreme Court of Oklahoma hereinbelow is not only in conflict with decisions interpreting or applying the First Amendment in the highest courts of other states, it is also in conflict at least with the spirit and implications of its own earlier decisions in this area. In *Williams v. Sullivan*, 350 Ok. 745, 131 P 703, 707 (1915), the Oklahoma court in commenting about an attorney's petitioning of a judge, assured Oklahoma attorneys that

> "[a]n attorney has the right to criticize the courts of this State, so long as his criticisms are made in good faith and in respectful language and with no design to willfully or maliciously misrepresent the position of the courts, or bring them into disrepute or lessen the respect due them."

In *State ex rel. Oklaholma Bar Ass'n. v. Porter,* 766 P2d 958 (Ok. 1988), upon which petitioner herein clearly relied, [App F, p. 1f] the theme of *Williams v. Sullivan* is reiterated and applied to a lawyer who publicly referred to a federal judge as a racist. The *Porter* Court found it significant that the trial panel had found, as it did hereinbelow, that

> "respondent established by unrefuted evidence that he had *subjectively* formed an opinion based upon experiences which he perceived as providing him with a rational basis for having concluded that the remarks he made had a factual basis." [*Porter* at p. 969][Emphasis supplied]

The *Porter* court then concluded that

> "[i]n the absence of a showing of falsity the

> statement must be held to be speech on vital issues of self government protected by the First Amendment. We thus hold that D.R. 1-102(A)(5)(6) [now 8.4(d)] cannot be construed to sanction the expressive activities before the Court." [*Porter* at p. 969]

Although there was no specific finding of good faith or altruism in *Porter*[8], as there was hereinbelow, [App A, p. 8a] the *Porter* court spoke of the need of the State to show "a subordinating interest which is compelling" [*Porter* at p. 967]. The *Porter* court at no point rendered any kind of analysis or caveat in any way suggesting that lawyer speech that is political and has a factual basis, as were both Porter's and petitioner's, should be assessed according to the broader standard of "reasonable likelihood of prejudice" to the administration of justice.[9]

D. This Court's Affirmation that the First Amendment Continues to Protect Pure Petitioning Activity of All Citizens is a Matter of Compelling Public Importance

In another state supreme court decision based on facts similar to those in the case at bar, [*In re Richmond*, 591 P2d 728 (Ore. 1979)], a lawyer spokesperson for an environmental organization sent a letter pertaining to the merits of a pending

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[8] Porter's speech was said to have been based merely on the speaker's *subjective* but rational opinion that the remarks he made about the Judge's alleged racism had a factual basis, and in a concurring opinion, Justice Opala stated that no discipline could have been constitutionally permissible even had the Bar proved that "respondent's remarks were *false in fact*". *Porter*, p. 970. [Emphasis supplied]

[9] The *Porter* court had the advantage of interpreting the more specific Ok. R.P.C. #3.6(a), which expressly prohibits public lawyer speech that would "have a *substantial likelihood* of materially prejudicing an adjudicative proceeding" [emphasis supplied]. Rule 8.4(d) type disciplinary rules contain no such interpretive guidelines.

administrative proceeding, to the Oregon governor, to members of news media, and others, with the acknowledged hope that it would influence the result in the administrative proceeding. [*Richmond*, p. 729] The Oregon high court noted that much of the lawyer's activity constituted classic petitioning of government for redress of grievances, citing this Court's opinion in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978). [*Richmond*, p. 730] The court noted that, notwithstanding the fact that Richmond was a trial participant whose petitioning speech was mixed with other traditionally less protected forms of expression,

> "it is clear that lawyers do not forfeit the right to speak or write freely or to petition the government just because they are 'officers of the courts'. . . . Litigation has long been recognized as one form of associational activity or 'petition.'" [*Richmond* at p. 730]

Although the conduct in *Richmond* included both petitioning and public speech issues, the court drew no distinction between First Amendment protections affordable to one form of expression but not to the other. In discussing potential restrictions on petitioning, the court did speak to the possible effect of petitions on proceedings that involved policy decisions and those that involved fact-finding, and remarked that certain factual statements were forms of expression necessary to place the public concerns of Richmond's client in proper context. [*Richmond* at p. 732] Certainly the letter of the petitioner herein does no more than place the political statements in the context of the underlying Perry vs. Perry litigation hereinbelow.

Unlike the Oklahoma court, the *Richmond* court declined to speculate about the possibilities of the factfinder's being required to recuse, and noted this Court's long-standing observation that "professional judges do not require the insulation

from extra-judicial criticism or public debate of a case that jurors do."[10] Petitioner submits that if judicial susceptibility to prejudice is as fragile as the Oklahoma Supreme Court decision below suggests, then it may become necessary to begin sanctioning all the lawyers on television commenting on ongoing high-profile cases in litigation, and not only sequester all judges involved in such cases, but make special provisions for the inspecting (and censoring) of incoming judicial mail.

II. CERTIORARI IS NECESSARY TO CREATE CONSISTENCY IN CONSTITUTIONAL INTERPRETATION OF ETHICAL STANDARDS, WHERE THERE IS NOW CONFLICT WITH DECISIONS OF THE UNITED STATES COURTS OF APPEALS.

A. This Court's Setting of Uniform Standards for assessing Prejudice to the Right of Fair Trial is a Matter of Compelling Public Concern.

The Oklahoma Supreme Court's usage for the first time of the reasonable likelihood standard, conflicts in the manner of application of the First Amendment, with a decision of the Fourth Circuit Court of Appeals. *Hirschkop v. Snead*, 594 F2d 356 (4th Cir. 1979) . *Hirschkop* remains one of the few decisions that has analyzed the competing free speech/ fair trial issues by breaking down the type of attorney conduct and type of proceedings potentially prejudiced, into manageable categories. The language of many of the attorney speech rules in *Hirschkop* was far more specific than is the general language of Oklahoma's Rule 8.4(d), and yet the Fourth Circuit held that constitutional principles prohibited most of the *Hirschkop* disciplinary rules from restricting

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[10] *In re Richmond*, 591 P2d 728, 731 (Ore. 1979)(ftnt.1), citing *Craig v. Harney*, 331 U.S. 367(1947) and *Pennekamp v. Florida*, 328 U .S. 331 (1946)

lawyer speech except for certain specific statements to media by lawyers representing litigants.

Hirschkop's Rule 7-107(G)(5), however, prohibiting statements made by attorneys representing civil litigants, about "any other matter reasonably likely to interfere with the fair trial of the action" (*Hirschkop*, p. 375) was held to be not only overly broad, but also void for vagueness.(*Hirschkop*, p. 373). Noting that *the American Bar Association committee and the Judicial Conference of the United States had made no recommendations at that time to restrict lawyer speech in any manner during civil trials*, the Fourth Circuit majority found that the integrity of the trial process in civil trials required no limitation at all on speech, not even a narrow one applying a clear and present danger standard. [*Hirschkop*, p. 373] Also, because restrictions on speech during pending civil cases would be likely to "prohibit comment over a period of several years" [*Hirschkop*, p. 373] and the court was unaware of any civil actions that had ever been prejudiced by pre-trial publicity[11], the *Hirschkop* court found it unacceptable to tell civil lawyers, *even those who were trial participants*, to delay comment until the conclusion of the case, citing this Court's protection of the timeliness and content of First Amendment speech in *Bridges v. California,* 314 U.S. 252, 268 (1941). Of course, in a child custody case, the delay in comment could commonly exceed a decade.

The *Hirschkop* Fourth Circuit focused specifically on the vastly decreased legitimacy of concerns for prejudice to the trial process in bench trials, noting that

> "[j]udges necessarily must consider evidence that has no direct bearing on the guilt or innocence

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[11] The *Hirschkop* court observed that another Court of Appeals had reversed the imposition of a gag order on lawyers during a civil trial due to First Amendment infringements in *CBS, Inc. v. Young*, 522 F2d 234 (6th Cir. 1975)

> of the accused. They must determine whether to suppress confessions and other evidence. When this evidence is excluded, they must nevertheless adjudge the accused to be guilty or innocent without considering the evidence which they have heard and held to be inadmissible. This record does not disclose what comments a lawyer could make about a pending case that would be more prejudicial than the information a judge must consider as he separates the wheat from the chaff during the course of an ordinary bench trial." (P. 371)

The record hereinbelow fails to reveal which, if any, statement in the SCAN letter was prejudicial, either in theory or in actuality.

The Seventh Circuit Court of Appeals has historically held that the First Amendment demands that a State make "sufficient specific findings . . . establishing that [attorney] conduct is a *serious and imminent threat* to the administration of justice" [emphasis supplied] before discipline for such conduct may validly be imposed in a manner consistent with federal constitutional principles. *In re Oliver,* 452 F2d 111, 114 (7th Cir. 1971). The Oklahoma Supreme Court made *no* specific finding of prejudice to *any* proceeding, choosing instead to speculate that petitioner's speech *might* have caused a judge to recuse or might have interfered with one of the participant attorneys' strategy of concealing certain facts from the judge. [App. A, ftnt 23] The Oklahoma Bar Association offered no reasons to suggest that petitioner's letter had a greater potential to prejudice the judge than would much of the material on child sexual abuse that daily appears on television and in the newspapers.

The *Oliver* court reinforced its protections of free speech and the right to meaningful notice, in *Chicago Council of Lawyers v. Bauer,* 522 F2d 242 (7th Cir. 1975) where the Seventh Circuit expressly rejected the "reasonable likelihood" standard as

overbroad, *regardless of the type of proceeding potentially affected*. *Bauer's* insistence on the serious and imminent threat standard was stated to "always be an element of any prohibition" [*Bauer*, p. 251] on lawyer speech of any type. The *Bauer* Court's holding regarding overbreadth and vagueness included concerns that some of the more general rules restricting lawyer speech could improperly be extended to attorneys "other than those involved on behalf of the Government" [*Bauer*, p. 253] The *Bauer* Court clearly intended to protect the First Amendment rights not only of attorneys not intimately involved in a criminal prosecution, but of any attorneys who might otherwise be prevented "from informing the public about the government's manner of performing certain tasks" , such as "that unsafe flight procedures were in effect and were being condoned by government regulatory agencies" [*Bauer*, p. 258]. The Oklahoma Supreme Court decision below, by ignoring the First Amendment and labeling the petitioner as unethical for bringing the issue of probable harm to a child to the attention of a judge charged with protecting him,[12] created a novel precedent that is irreconcilably in conflict with decisions from the Fourth and Seventh Circuits.

B. American Citizens, Including Lawyers, Need Clear Federal Constitutional Guidelines so that they Can Avoid Speech that May Prejudice a Pending Trial

The Oklahoma decision below conflicted with a decision of the Seventh Circuit addressing First Amendment rights of those who petition government. In *Marshall v. Allen*, 984 F2d 787 (7th Cir. 1993) an attorney public employee was held to have established public employer violations of his rights of free expression where the employee's speech, as hereinbelow, addressed a matter of great public concern and it was the

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[12] The trial judge testified and agreed that problems with the implementation of the supervised visitation order were matters of which he should be informed [App. E, p. 6e] and that he was statutorily mandated to protect the Perry child.[App.E, p. 7e]

protected speech that had clearly caused the governmental sanctions. *See also White Plains Towing Corp. v. Patterson*, 991 F2d 1049 (2nd Cir. 1993); *Eaton v. Newport Bd. Of Ed.*, 975 F2d 292, 299 (6th Cir. 1992).[13]

The Ninth Circuit Court of Appeals was called upon to apply a local Rule of Practice for a United States District Court prohibiting

> "conduct which degrades or impugns the integrity of the Court or in any manner interferes with the administration of justice therein." [Rule 2.5.2, Local Civil Rules of Practice of the United States District Court, Central District of California]

to a lawyer's sexist diatribe directed against women attorneys. *U.S. v. Wunsch*, 54 F3d 579 (9th Cir. 1995). In a unanimous decision, the Court of Appeals found that the record contained no showing of adverse effect on the administration of justice, "either in this or in any other case", and stated, as it cited this Court's decision in *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), that such lawyer speech could not, consistently with the First Amendment, be sanctioned without "facts showing a 'substantial likelihood of material prejudice'". [*Wunsch*, p. 585]

The Ninth Circuit again reversed sanctions imposed upon attorney speech under California's Rule 2.5.2 in *Standing Committee v. Yagman*. 55 F3d 1430 (9th Cir. 1995) even where the speech consisted of numerous vicious accusations of anti-

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[13] In *Eaton,* the Sixth Circuit held that the actions of citizens and employees, including petitioning, though part of a campaign to influence the *judicial* function of the school board, were not subject to sanctions because the First Amendment prohibits efforts to ensure 'laboratory conditions' during school board's decision making, "in the absence of clearly defined laws proscribing the conduct", citing this Court's decision in *Cox v. Louisiana*, 379 U .S. 559 (1965).

Semitism and drunkenness on the bench, hurled at a Judge in an apparent attempt to obtain his recusal. The Ninth Circuit specifically held that where the extra-judicial attorney speech is not based on the kind of special access to information that would be privy to a lawyer for a litigant in a pending case, even the *Gentile* substantial likelihood of material prejudice standard was too broad to protect First Amendment rights. [*Yagman*, p. 1442] The *Yagman* Court, reasoning that since the speech of lawyers not representing litigants is not perceived as particularly authoritative, as the Oklahoma trial judge admitted the petitioner's was not in his estimation [App. E, p. 1e], the State was required to show a "clear and present danger" to the administration of justice before it would be permitted to impose sanctions for such speech. The Ninth Circuit decisions are patently in conflict with the Oklahoma decision below.

The Fifth Circuit rendered a decision granting declaratory relief against a State Commission for reprimanding a Texas judge for statements critical of the judicial system contained in a letter to a newspaper. Against the State's contentions that the reprimand was necessary to "preserve the impartiality of the judicial branch", the Fifth Circuit reversed the District Court's grant of summary judgment to the State Commission, holding that the First Amendment protected such speech. *Scott v. Flowers*, 910 F2d 201, 212 (5th Cir. 1990). The Fifth Circuit opinion acknowledged that normally speech by citizens critical of the legal system is absolutely protected by the First Amendment absent a showing of clear and present danger. In the context of criticisms of government having nothing to do with his own conditions of employment, Judge Scott was found to have been "likely to have well-informed opinions" [*Scott*, p. 211] which should not have been silenced without an explanation of

> "precisely how Scott's public criticisms would impede the goals of promoting an efficient and impartial judiciary, and we are unpersuaded that they would have such a detrimental effect. Instead, we believe

> that those interests are ill served by casting a cloak of secrecy around the operations of the courts, and that by bringing to light an alleged unfairness in the judicial system, Scott in fact furthered the very goals that the Commission wishes to promote." [*Scott*, p. 213]

The same may as easily be said about the factual information provided to the Oklahoma trial judge, none of which was ever alleged by the State to be inadmissible. Such information as the SCAN letter offered, Judge Lee was free to ignore, or allow the parties to the litigation to fully litigate. The SCAN letter's references to the child's mother as an 'alleged perpetrator" are not, as the Oklahoma Court conjectures, "unsubstantiated assertions" made to persuade the judge of her unfitness for custody [App. A, ftnt 21], but rather, unquestionably accurate assessments that serious allegations had in fact been made, a fact that everyone participating in the case already knew. The obvious point of referencing the existence of abuse allegations was to give a context to the SCAN citizens' concerns about the competence of county agencies' child welfare investigations as well as another agency's lack of compliance with a court order designed to protect the Perry child. The overriding goals of the letter appear to have been not to influence the outcome of the litigation in a particular direction but to assist the Court in being aware of factors existing in his county that, if addressed[14], would strengthen the integrity of child welfare investigations and encourage rigorous implementation of judges' supervision orders. It would seem that making the information about the county agencies available to the trial judge could assist him in focusing the sanitizing light of judicial inquiry upon child abuse investigative

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[14] Addressing the fitness of public officeholders is specifically mentioned in the Official Comment to Oklahoma's RPC 8. 2 which states in part, that "[a]ssessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices. . . Expressing honest and candid opinions on such matters contributes to *improving the administration of justice*."

and supervised visitation processes, whose integrity is necessary not only in the interests of an abused child, but also to protect a falsely accused parent.

In summary, petitioner submits that an equally or more persuasive argument can be made that the "interjection" of the small amount of factual information contained in the SCAN letter helped to preserve the integrity and justice of the underlying litigation, than can be made that such information tainted or prejudiced it.[15] This Court's grant of certiorari would offer needed constitutional guidelines enabling the federal and state courts to perceive and tolerate the expression of diverse concepts of justice.

III. THIS COURT'S GRANT OF CERTIORARI IS NECESSARY TO RESOLVE CONFLICTS CREATED BY THE OKLAHOMA SUPREME COURT DECISION WITH DECISIONS OF THE UNITED STATES SUPREME COURT

A. It is a Matter of Great Public Importance that this Court Reaffirm that Where Free Speech is Threatened, Federal Constitutional Principles Take Priority Over State Disciplinary Regulations

Although petitioner raised her First and Fourteenth Amendment arguments early, often, and in detail,[App D, E, & F] and even though the Trial Panel specifically withheld making any conclusions of law because the "constitutional issues argued in this case are beyond the purview of the Trial Panel", [Appendix B]

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[15] The Oklahoma opinion below suggested that petitioner should be faulted for not having conducted an "independent investigation of the facts" [App. A, 2a]. The record below, however, reveals that such an investigation, requiring interviewing of attorney Wallace, his client, and/or the government workers, was clearly not an option available to petitioner due to confidentiality or ethical restrictions far more obvious than are the parameters of Rule 8.4(d).

the Supreme Court of Oklahoma excluded any express reference to the United States Constitution in its opinion, other than in Footnote 9 where it is noted that petitioner had raised the First Amendment issues. The Oklahoma opinion suggested that the principles set forth in its earlier decision in *State of Oklahoma ex rel. Okla. Bar Ass'n. v. Porter*, 766 P2d 958 (Ok. 1988) and in this Court's decision of *Gentile v. State Board of Nevada*, 501 U.S. 1030 (1991) might have been considered, had petitioner's letter been broadcast in the media, and then completely failed to recognize that the core petitioning act of sending the SCAN letter was entitled to the same First Amendment protections as is public speech in the media. *McDonald v. Smith*, 472 U.S. 479 (1985). *See also California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *Eastern R.R. Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961). Oklahoma's decision below, by excluding any consideration of the First Amendment, using the pretext that petitioner's obviously respectful participation in expressive self-government constituted an affront to the dignity of the court, is still a decision on an important question of federal constitutional law, and one that runs *contra* to this Court's decision in *Bridges v. California* 314 U.S. 252 (1941) where the dignity of the Court was determined to be sufficiently resilient that it could withstand a labor leader's telegram to the Secretary of Labor calling a judge's decision outrageous and predicting serious consequences to efforts to enforce the order. This Court in *Bridges* further held that for government to restrict speech or petitioning, both of which were present in *Bridges*, in furtherance of its stated goal of punishing conduct deemed prejudicial to the administration of justice,

> "the substantive evil must be extremely serious and the degree of imminence extremely high" [*Bridges*, p. 263].

In criticizing the government's attempt to justify a restriction based on speech occurring during the pendency of a trial, the *Bridges* Court severely disapproved such attempts at restriction

> "at the precise time when public interest in the matters discussed would naturally be at its height. Moreover, the ban is likely to fall not only at a crucial time but upon the the most important topics of discussion. . . No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression." [*Bridges*, pp. 268-269]

This Court has reiterated these concerns in *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1035 (1991).

Oklahoma's decision to sanction petitioner below creates important and dangerous precedent in which the First Amendment has been held to not even be *relevant* to the speech of citizens concerning vital issues of public concern, particularly if the speaker is of a particular occupation. The message seems clear that no lawyer, even when acting wholly as a private citizen, may engage in pure petitioning activity or political speech without fear of losing his or her livelihood.

Despite this Court's clear refusal to allow a State "under the guise of prohibiting professional misconduct, [to] ignore constitutional rights" [*NAACP v. Button*, 371 U.S. 415, 439 (1963)], the Oklahoma court required no showing of a legitimate need, much less a compelling state interest in protecting the public civil bench trial process that would justify its sanctioning and chilling of pure speech unmixed with conduct.[16]

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[16] In *Cox v. Lousiana*, 379 U.S. 559 (1965) this Court recognized that a State has a legitimate interest in protecting the integrity of an ongoing criminal jury trial and could constitutionally *regulate* picketing outside the courthouse where such speech, though constituting in part, core

B. This Court's Setting of Clear and Uniform Constitutional Standards is a National Priority so that Speech on Matters of Public Concern Cannot Be Sanctioned under State Regulations that are Vague and Overbroad

The decision hereinbelow, although based on speech addressed to a smaller audience, in the context of a civil bench trial and not a criminal jury trial, is in conflict with this Court's decision in *Gentile v. State Board of Nevada*, 501 U.S. 1030 (1991) in that neither the Nevada nor the Oklahoma disciplinary rule had a settled usage or tradition of interpretation in the State sufficient to place either attorney on notice of that which the Rule prohibited. Both attorneys had reason to believe that their speech was protected under their respective State's Safe Harbor provisions. [App. F, p 9f] This Court held that such a good faith belief misled attorney Gentile into thinking that he could speak publicly without fear of discipline, [*Gentile*, p. 1048] and that the rule under which Gentile was sanctioned, although far narrower and more specific than 8.4(d), was too vague, when considered as a whole with the Safe Harbor provisions of the rule, to provide fair notice to those to whom the rule was directed. [*Gentile*, p. 1048] Petitioner Hine was similarly misled by the provisions of Oklahoma's R.P.C. 3.6(d)(6) to believe that, given the expressly granted right to use the media to warn the public of the behavior of the Child Welfare investigator and the Youth Services visitation supervisor, that 3.6(d)(6) fairly included the right to alert the trial judge to the same potential for public harm.[17] The record further demonstrated petitioner's reasonable reliance on an array of legal

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petitioning expression, was also *mixed with conduct. Although the State's regulation in Cox was far more specific than is 8.4(d), this Court held that governmental conduct gave ambiguous messages to Cox about the lawfulness of his picketing under the statute, and the State could not therefore sanction him when he had no clear advance notice of what specifically was being prohibited.*

[17] At least one court has expressly determined that speech about matters of public concern need not be aired publicly in order to be protected by the First Amendment. *Peterson v. Atlanta Hous. Auth.*, 998 F.2d 904 (11th Cir. 1993)

authorities seemingly authorizing or even immunizing her conduct.[18] Oklahoma's R.P.C. #8.4(d), as applied hereinbelow, creates an even greater trap for the wary as well as the unwary than that which existed in Gentile.

This Court's reasoning in *Gentile,* while it explained that a state disciplinary rule restricting the attorney speech of a criminal defense attorney was not overly broad if it required the State to show that the speech created a substantial likelihood of material prejudice, suggested that the failure to require the narrower, clear and present danger standard was based on attorney Gentile's having been an active participant in the trial.[19] The fact that the underlying proceeding in *Gentile* was criminal and the fact finder, lay, surely made a huge difference as well.

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[18] Petitioner's Response [App. B] cited Oklahoma's RPC #6.4 permitting a lawyer to be a member of an organization devoted to law reform activities even if the interests of a client are affected, EC 9-1 encouraging the giving of assistance to judges, and general principles of petitioning a Court as an *amicus curiae*.[App D] *See also* discussion of Oklahoma's Rule 8.2 at Note 11 *supra*. Petitioner also testisfied to the Trial Panel [App E, p. 16e] concerning her obligations to report child abuse, which some of the agency conduct was described as being.[App E, pp. 12e-14e]. 42 U.S.C. Sec. 5106a(b)(A)(iv) or its antecedent required Oklahoma to provide "for immunity from prosecution under State and local laws and regulations for individuals making good faith reports of suspected or known instances of child abuse or neglect". 10 Ok. St. Sec. 7105 also appears to extend immunity for child abuse reporters,[every Oklahoman being considered a mandated reporter] to actions taken "with respect to participation in any judicial proceeding resulting from such report."

[19] Justice Kennedy's opinion in *Gentile* [p. 1057] noted "the proposition that an attorney's speech about pending cases may present dangers that could not arise from statements by a *nonparticipant*" but acknowledged that attorney speech simply because of "its persuasiveness, from their ability to explain judicial proceedings, or from the likelihood the speech will be believed" does not give rise to "the sort of dangers that can validate restrictions. The First Amendment does not permit suppression of speech because of its power to command assent." [p. 1057].

Another concern expressed in *Gentile*, particularly in light of the vagueness problems of the regulation under which the attorney was disciplined, was the serious potential for discriminatory enforcement where the offending speech

> "is critical of those who enforce the law. The question is not whether discriminatory enforcement occurred here, and we assume it did not, but whether the Rule is so imprecise that discriminatory enforcement is a real possibility". [*Gentile*, at p. 1051]

This Court expressed similar concerns in *Wayte v. United States*, 470 U.S. 598 (1985) in which prosecutorial "selectivity" was disapproved if "deliberately based upon an unjustifiable standard such as . . . the exercise of protected statutory and constitutional rights." [*Wayyte*, Hdnt. 3] The potential for such discrimination is a factor whether the sanctioning governmental action or rule is overly vague or overly broad [*NAACP v. Button*, 371 U.S. 415 (1963)(Hdnt 13)]. In either event, the unpopularity of the expressed beliefs, while having no theoretical effect on the First Amendment protections available [*Button*, Hdnt. 21], makes both discriminatory enforcement and the chilling of protected speech, potentially grim realities.[20]

This Court has noted that there are few issues

> "of government of higher concern and importance to the people than the manner in which criminal trials are conducted." [*Richmond Newspapers, Inc.*

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[20] The testimony of child advocate Diana Carroll was unrefuted that fear of bar discipline chilled numerous attorneys' participation in child advocacy organizations and that those speaking out on behalf of children's interests "come under fire very frequently. . . . they get their hands slapped, forewarned. It's just not worth it."[App. E, p. 11e]

v. Virginia, 448 U.S. 555, 575 (1980)

When the U.S. Advisory Board on Child Abuse and Neglect referred to child abuse as a "national emergency"[21], it echoed the feelings of many American citizens that there is nothing of higher priority than the family and the manner in which the child protection system addresses, or fails to address, the interests of abused children.

Americans are increasingly demanding legal insights to explain the increasing violence of their world. To meet that demand, there has emerged an unprecedented media outpouring of commentary by well known legal scholars and practicing attorneys. Such attorney speakers may now well question the potential for governmental retaliation under broad and general disciplinary regulations such as Oklahoma's 8.4(d). One would hope that it will not now be left solely to lay people to comment on the high profile child abuse and domestic violence cases, for fear that the sitting judge might have tuned in and thereby become prejudiced. Certainly it was not exclusively to non-lawyer citizens that First Amendment draftsman James Madison addressed the following comments:

> "[t]he people may therefore publicly address their representatives, *may privately advise them,* or declare their sentiment by petition to the whole body; in all these ways they may communicate their will." [Emphasis supplied] [1 Annals of Cong. 738 (1789)]

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[21] CHILD ABUSE AND NEGLECT: CRITICAL FIRST STEPS IN RESPONSE TO A NATIONAL EMERGENCY VII (Aug. 1990)(U.S. Government Printing Office, Superintendent of Documents, Washington, D.C. 20401 No: 0117-092-00104-5) This Board was established under the provisions of the 1988 Amendments to the Child Abuse Prevention and Treatment Act.

and that the First Amendment required that there be no

> "retreating toward the exploded doctrine that the administrators of the Government are the masters and not the servants of the people." Address of the General Assembly to the People of the Commonwealth of Virginia, Jan. 23, 1799, 6 Madison's Writings 338 (Hunt ed. 1910), and 4 Elliott's Debates on the Federal Constitution 596 ff. (1876)

Clearly if attorney disciplinary proceedings can evade so much as a mention that federal constitutional principles even exist, the wary as well as the unwary will understand that discipline under such rules can be applied to any lawyer, under any circumstances.

IV. CONCLUSION

The state and federal courts of this nation are operating under different assumptions about the standards to apply to lawyer speech. Yet most of those assumptions and standards are ascribed to this Court. The resulting confusion about lawyer and lay speech is tantamount to the chilling of protected speech. It is a matter of compelling public urgency that this Court set specific federal constitutional standards for state restrictions of speech during the pendency of civil bench trials.

Respectfully Submitted,

THE PETITIONER,

HELEN L. MCGONIGLE*
Attorney at law
P.O. Box 326
24 Meadowview
Brookfield, Connecticut 06804-0326
(614)772-6400

ALAN W. SCHEFLIN
Professor of Law
Santa Clara University Law School
3045 21st Avenue
San Francisco, California 94132
(415)665-6469

*Counsel of Record

APPENDIX A

STATE OF OKLAHOMA ex rel. Oklahoma Bar Association, Complainant, v. KATHERINE HINE, Respondent.

SCBD No. 4155. April 22, 1997

BAR DISCIPLINARY PROCEEDING

Although *not* an advocate for any party in a pending child-custody case, respondent corresponded *ex parte* with the trial judge regarding issues material to the matter. The Bar sought imposition of discipline. After considering the adduced evidence, the Professional Responsibility Tribunal [PRT] made findings of fact but declined (a) to fashion conclusions of law or (b) to recommend a measure of discipline. Upon this court's *de novo* consideration of the record reflecting proceedings before the PRT and of the PRT's findings of fact,

RESPONDENT IS ORDERED
DISCIPLINED BY PUBLIC REPRIMAND
AND BY IMPOSITION OF COSTS.

Janis Hubbard, Assistant General Counsel, Oklahoma Bar Association, Oklahoma City, Oklahoma, for Complainant.

Katherine Hine, Columbus, OH, Pro Se.

LAVENDER, J.: In this disciplinary proceeding against a lawyer we are called upon to decide an issue of first impression: whether a licensed practitioner *who is not an advocate for any parties* in a pending case may nonetheless communicate *ex parte* with the trial judge about issues in the matter which the court has under consideration.

I

PROCEDURAL AND FACTUAL HISTORY

In her capacity as a member of the child advocacy group, Stop Child Abuse Now [SCAN], Katherine Hine [Hine or respondent] - a licensed lawyer - was contacted by Ruth Fulton, who asked her for SCAN's help in dealing with the suspected sexual abuse of Fulton's grandson (by the child's mother and certain enately related family members). The grandson was the object of a pending child-custody suit [Perry v. Perry[1]] in the LeFlore County District Court. *Hine did not represent any parties in the case.*

After conversing with Fulton and her son, David Perry, respondent contacted Belva Brooks Barber (Mr. Perry's counsel) and asked her how the Department of Human Services had handled the inquiry into the grandson's alleged sexual abuse.

Based upon the information garnered from Fulton, Perry and the one conversation with Barber and *sans* independent investigation of the facts, respondent composed the September 21, 1995 letter which she faxed to Judge Michael Lee on September 22, 1995 - the scheduled hearing date on a motion to modify custody in the *Perry* case. The fax was on SCAN letterhead, was signed by Hine and seven other SCAN members and contained facts *material* to the case's issues[2]. Although one of the phone numbers listed on the letterhead was the

respondent's, Hine's status as a licensed lawyer was not otherwise reflected on the correspondence[3]. Respondent testified that copies of the letter were mailed to the counsel of record in *Perry* the same morning that it was sent to the judge. She also explained that she was a one-person office, did her own typing and had used addresses (from a borrowed 1993 Oklahoma Legal Directory) which, as it turned out, were not current[4]. The counsel of record in the *Perry* case testified that the *only* copy of the letter which either ever received was the one which Judge Lee provided them the morning after he received the fax.

Both Robert A. Wallace and Belva Brooks Barber filed complaints against Hine characterizing the SCAN letter as an unsolicited *ex parte* communication with the judge in a pending case. This disciplinary proceeding was then commenced by a one-count complaint - brought pursuant to Rule 6, Rules Governing Disciplinary Proceedings [RGDP], 5 O.S. 1991, Ch. 5, App. 1-A - charging Hine with violating the provisions of Rules 3.3[5], 3.5[6] , and 8.4(d)[7], Oklahoma Rules of Professional Conduct [ORPC], and Rule 1.3[8] , RGDP. After considering the adduced evidence, the Professional Responsibility Tribunal [PRT] made findings of fact but declined (a) to fashion conclusions of law or (b) to recommend a measure of discipline. In its report the PRT observed that the constitutional issue[9] raised by the respondent was beyond its purview.

II

STANDARD OF DETERMINATION IN BAR DISCIPLINARY PROCEEDINGS

The standard of determination for bar disciplinary proceedings enunciated in *State ex rel. Oklahoma Bar Association v. Todd*, 833 P2d 260 (Okla. 1992) is applicable. There the court held:

> In attorney disciplinary proceedings this Court's determinations are made *de novo*. The ultimate responsibility for deciding whether misconduct has occurred and what discipline is warranted if misconduct is found rests with us in the exercise of our exclusive original jurisdiction in bar disciplinary matters. Accordingly, neither the findings of fact of a Professional Responsibility Tribunal [PRT] nor its view of the evidence or credibility of witnesses are binding on us and recommendations of a PRT are merely advisory. (citations omitted)

Id. At 262.

In a *de novo* review, in which this court exercises its nondelegable power to regulate both the practice of law and legal practitioners,[10] a full-scale exploration of all relevant facts is mandatory.[11] To impose discipline upon a lawyer in a contested case, the charges must be proved by clear and convincing evidence.[12] *See* Rule 6.12(c), RGDP.

III

HINE'S COMMUNICATION WITH THE TRIAL JUDGE VIOLATES THE STANDARD OF PROFESSIONAL CONDUCT WHICH IS EXPECTED OF AN OFFICER OF THE COURT

The court's responsibility in a disciplinary proceeding is not to punish but to inquire into the lawyer's continued fitness, with a view to safeguarding the interests of the public, of the courts and

of the legal profession.[13] The circumstances of a lawyer's professional misconduct (*see* Rule 6[14]) are important in searching for solutions that would accord with the law's imperative of ensuring the public its due protection from substandard lawyers.[15]

The respondent would have the court focus on the fact that she sent the SCAN letter to Judge Lee in her capacity as a private citizen. Hine - though not an advocate in the cause before the district court - was nonetheless *an officer of the court.*[16] As such, she owed a special duty to the judicial system - an obligation of respect greater than that owed by other participants in the legal process.[17]

The respondent correctly argues that the rules governing *ex parte* communications *by advocates* do not apply to her.[18] The standards of practice enumerated in Rules 3.1 *et seq.*, ORPC, are designed to govern the behavior of litigants and their counsel actively involved in the legal process. Otherwise, that sections' caption, "ADVOCATE", is rendered meaningless.[19] This is not to say that lawyers - who are *non-advocates* - can interject themselves in a case pending before the district court without [sic] impunity.

Because of her license to practice law, Hine is obligated as an officer of the court not to engage in conduct that is prejudicial to the administration of justice. Rule 8.4(d), ORPC.[20] In this cause we are *not* concerned with communications to the press or other public fora. *Here the respondent communicated directly with a trial judge, sitting in a pending cause, with the intent to influence him on the proceeding's merits.*

While this court has not previously circumscribed the reach of Rule 8.4(d), ORPC, the rule's intent mandates that the respondent's conduct be assayed against a reasonable-likelihood-of-material-prejudice standard. This standard is to be applied to the facts in the statements and the circumstances under which they were made - including time, place and the respondent's justifications for the conduct. If Hine knew or should have known that there was a reasonable likelihood her actions would materially prejudice the pending adjudicative proceedings, discipline is appropriate. The standard which the court adopts today fosters and protects the State's interest in fair trial and delimits the outer contours of that conduct which - if engaged in by a licensed lawyer - would offend Rule 8.4(d).

While the SCAN letter contains speech of a mixed character,[21] the language used was published to no one other than the trial judge. Had Hine's offending speech been contained in a statement to the public media - as was the practitioner's offending conduct in *State of Oklahoma ex rel. Okla. Bar Ass'n. v. Porter*, 766 P.2d 958, 961 (Okla. 1988) or in *Gentile v. State Board of Nevada*, 501 U.S. 1030, 1034, 111 S.Ct. 2720, 2724, 115 L.Ed.2d 888 (1991) - a different test might have applied. Such is not the case. The evidence is *clear and convincing* that the SCAN letter representations were communicated directly to the trial court with the underlying intention of influencing the outcome of the Perry child-custody hearing. We express no opinion today regarding a [non-advocate] lawyer's statements about a pending case made to persons other than the presiding trial judge.

As recognized by the Court in *Gentile*, 501 U.S. at 1058, 111 S.Ct. at 2736, "the American trial remains one of the purest, most rational forums for the lawful determination of disputes." The admonition of Holmes, J., in *Patterson v. Colorado ex rel. Attorney General of Colorado*, 205 U.S. 454, 463, 27 S.Ct. 556, 558, 51

L.Ed. 879 (1907), remains sound even to this day. He stated, *"[w]hen a case is finished*, courts are subject to the same criticism as other people, but the propriety and necessity of preventing interference with the course of justice by *premature* statement, argument or intimidation hardly can be denied." [Emphasis added.] When the timing and acknowledged intent of the respondent's letter to Judge Lee in a pending case are weighed against the above standards, there is no doubt that Hine's conduct requires the imposition of discipline. As a licensed practitioner, she either knew or should have known that the facts - which she intentionally interjected into the trial process - had not been tested by being run through the gamut of the adversarial process, regardless of the court' s ultimate decision on the matter.[22] Measured at the time Hine faxed the SCAN letter to the sitting judge, there was a reasonable likelihood that her conduct would materially prejudice the child-custody hearing. The interjection of material facts into a pending adjudicative proceedings by lawyers who are non-advocates has the potential of causing a judge to recuse himself, of increasing the litigation's costs for the parties, and of affecting the advocates' representation of their clients by interfering with their trial strategies[23] - all to the prejudice of the administration of justice. Being an officer of the court demands greater respect for the integrity of the judicial process than that demonstrated by the respondent.

IV
CONCLUSION

Respondent intentionally interjected into a pending adjudicative process facts material to the issues before the court with the intent to influence the case's resolution. Although a non-advocate in the matter, as a licensed lawyer Hine had to appreciate the reasonable likelihood of prejudice tot he administration of justice which her acts would wreak. While Rules

3.1 *et seq.*, ORPC, governing the conduct of lawyers as advocates, do not apply to the respondent's conduct, Rule 8.4(d) certainly does. As a licensed practitioner and an *officer of the court*, Hine was duty-bound to avoid interjecting facts - which she knew had not been tested by the adversarial process - into a pending adjudicative proceeding.

On *de novo* review, we find the Bar's complaint that the respondent engaged in conduct which was prejudicial to the administration of justice amply supported by clear and convincing evidence. Hine's conduct calls for the imposition of discipline. To hold otherwise would be tantamount to approving a licensed lawyer's demonstrated disrespect for the adjudicative process.

In view of the respondent's altruistic motives and other mitigating evidence presented, we conclude that the imposition of a public reprimand is an appropriate disciplinary sanction in this case. Respondent is further required to pay the costs of this proceedings in the amount of $2,801.73 within thirty (30) days after this opinion becomes final.

Upon publication of this opinion in the official reporter Respondent shall stand publicly reprimanded.

LAVENDER, HODGES, SIMMS,
HARGRAVES, OPALA, WATT, JJ., concur;
KAUGER, C.J., and WILSON, J., concur in part and dissent in part;
SUMMERS, V.C.J., not participating.

1. The pending suit was Perry v. Perry, JFD-91-619. Mr. Perry was represented by Belva Brooks Barber and Mrs. Perry was represented by Robert A. Wallace.

2. The fax specifically referred to the Perry case and interjected into the hearing facts concerning the alleged sexual abuse of the boy then in his mother's custody). The correspondence questioned the Department of Human Services' response to the alleged abuse and the accuracy of the LeFlore County Child Welfare and DHS's investigations in the case. The SCAN letter also informed the court that its temporary order was being disregarded.

3. The sheet accompanying the fax also reflected the correspondent's office phone number.

4. Barber testified that while her street address had changed, during all relevant times her post office number remained the same.

5. The pertinent terms of Rule 3.3, ORPC, 5 O.S.1991, Ch. 1, App. 3-A, provide:

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of fact or law to a tribunal;
>
> *****
>
> (4) offer evidence that the lawyer knows to be false . . .

6. The pertinent terms of Rule 3.5, ORPC, 5 O.S.1991, Ch.1, App.3-A, provide:

> A lawyer shall not:
>
> (a) seek to influence a judge . . . except as permitted by law or the rules of a tribunal;
>
> (b) in an adversary proceeding, communicate or cause another to communicate as to the merits of the cause, with a judge or an official before whom the proceeding is pending except:
>
> *****
>
> (2) In writing if the lawyer promptly delivers a copy of the writing tot he opposing counsel or to the adverse party if not represented by a lawyer . . .

7. The pertinent provisions of Rule 8.4(d), ORPC, 5 O.S.1991, Ch.1, App. 3-A, are:

> It is professional misconduct for a lawyer to:
>
> (d) engage in conduct that is prejudicial to the administration of justice . . .

8. The provisions of Rule 1.3 RGDP, 5 O.S.1991, Ch. 1, App. 1-A, are:

The commission by any lawyer of any act contrary to prescribed standards of conduct, whether in the course of his professional capacity, or otherwise, which act would reasonably be found to bring discredit upon the legal profession, shall be grounds for disciplinary action, whether or not the act is a felony or misdemeanor, or a crime at all. Conviction in a criminal proceeding is not a condition precedent to the imposition of discipline.

9. Hine defended her communication with the district court judge as an exercise in freedom of expression protected by the First Amendment, U.S. CONST.

10. State ex rel. Okla. Bar Ass'n v. Raskin, 64 P.2d 262, 265 (Okla. 1982); Tweedy v. Okla. Bar Ass'n, Okla., 624 P.2d 1049, 1052 (1981).

11. State ex rel. Oklahoma Bar Association v. Dugger, 385 P.2d 486 (syllabus)(Okla. 1963).

12. State ex rel. Oklahoma Bar Association v. Miskovsky, 824 P.2d 1090, 1093 (Okla. 1991). See also in the Matter of C.G., 637 P.2d 66, 71 N. 12 (Okla. 1981), where clear and convincing evidence was defined as:

> "that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegation sought to be established (citations omitted)".

13. State ex rel. Okla. Bar Ass'n v. Donnelly, 848 P.2d 543, 545-46 (Okla. 1992); State ex rel. Okla. Bar Ass'n v. Colston, 777 P.2d 920, 925 (Okla. 1989); State ex rel. Okla. Bar Ass'n v. Moss, 682 P.2d 205,207 (Okla. 1983); State ex rel. Okla. Bar Ass'n v. Harlton, 669 P.2d 774, 777 (Okla. 1983); Raskin supra note 10 at 267.

14. Rule 6 (Formal Proceedings Before Supreme Court and Professional Responsibility Tribunal), Rules Governing Disciplinary Proceedings, 5 O.S. 1991, Ch.1, App. 1-A, requires the Bar to set forth in its complaint the "specific facts constituting the alleged misconduct." [Emphasis added.]

15. Donnelly, supra note 13 at 547-48.

16. Chief Justice Cardozo in Karlin v. Culkin, 162 N.E. 487, 489 (N.Y. 1928), noted that a lawyer admitted to practice "[w]as received into that ancient fellowship for something more than private gain. He became an officer of the court, and, like the court itself, an instrument or agency to

advance the ends of justice." [Emphasis added.] Of relevance also is the oft-repeated statement of Cardozo, J., that "[m]embership in the bar is a privilege burdened with conditions." In re Rouss, 221 N.Y. 81, 84, 116 N.E. 782, 783 (N.Y. 1917)

17. See State ex rel. Oklahoma Bar Assn. v. Porter, 766 P.2d 958 (Okla. 1988), where the court held:

> "A member of the legal profession is subject to reasonable restraint in his professional behavior exceeding those which exists in respect to the general public." Id. At 962 [Emphasis added.]

18. Because we hold the provisions of Rule 3.1 et seq., RGDP, do not govern the respondent's conduct as a non-advocate we need not reach the issue whether or not she mailed copies of the SCAN fax to the counsel of record in Perry.

19. Statutory language is not to be construed in a manner that would render it meaningless. See Strelecki v. Okl. Tax Com'n, 872 P.2d 910, 920 n.69 (Okla. 1995); Anderson v. O'Donoghue, 677 P.2d 648, 651 (Okla. 1983); In re Supreme Court Adjudication, Etc. 597 P.2d 1028, 1210 (Okla. 1979).

20. For the pertinent terms of Rule 8.4(d), see supra note 7. For a deeper perspective of a practitioner's obligations as an officer of the court, see Eugene R. Gaetke, "Lawyers as Officers of the Court," 42 VAND. L. REV. 39, 51-56 (1989).

21. Part of the SCAN letter is directed at the Department of Human Services and other agencies' performance and is political in character. The fax's unsubstantiated assertions that the child was sexually abused by his mother and other relatives is best characterized as hearsay concerning the fitness of Ms. Perry to retain custody and of very limited pertinence to our governmental system's operation.

22. Judge Lee testified that the SCAN letter did not prejudice his decision in the Perry case.

23. See Hearing Tr. Pp. 136-38, 146-148.

APPENDIX B

1b

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

BEFORE THE PROFESSIONAL RESPONSIBILITY TRIBUNAL

STATE OF OKLAHOMA ex rel. Oklahoma Bar Association, Complainant	)	OBAD #1240
	)	SCBD #4155
v.	)	
KATHERINE HINE, Respondent.	)	

TRIAL PANEL REPORT

This matter came on for hearing before the undersigned Trial Panel of the Professional Responsibility Tribunal ("**Trial Panel**") on the 19th day of June, 1996 pursuant to regular assignment and after notice to all and agreement of the parties. Complainant, State of Oklahoma ex rel, Oklahoma Bar Association appears by and through its Assistant General Counsel, Janis Hubbard and Respondent, Katherine Hine appears by and through her counsel of record, William Choate. Complainant and Respondent announced ready to proceed and thereupon presented their respective cases by introduction of and presentation of witnesses being first duly sworn. Subsequent to the hearing on July 1, 1996, pursuant to the Scheduling Order of April 15, 1996, the parties submitted to the Trial Panel on July 1, 1986, their respective findings of fact and conclusions of law. There were neither stipulations of fact or conclusions or[sic] law

nor a stipulation with respect to discipline. The Complainant recommends Respondent receive a public censure and the Respondent argues her actions are constitutionally protected by the First Amendment and therefore, the complaint against her should be dismissed. The Trial Panel, after taking into consideration all the above and hearing arguments and statements of Complainant and Respondent, makes the following findings of fact, conclusions of law and recommendations to the Supreme Court of the State of Oklahoma.

Findings

1. The Respondent is member of the Oklahoma Bar Association and is licensed to practice law by the Supreme Court of the State of Oklahoma. The Respondent was so licensed at all times relevant to this complaint.

2. These proceedings are begun pursuant to Rule 6, RGDP.

3. The official Oklahoma Bar Association roster address of the Respondent is: Katherine Hine, OBA #100754, 508 Crabtree, Muskogee, Oklahoma 74403.

4. The Oklahoma Rules of Professional Conduct ("**ORPC**") 5 O.S. ch. 1, app. 1-A (1995) are the standard of conduct, adopted and enforced by the Supreme Court of the State of Oklahoma, provides guidelines by which all attorneys are to practice law in Oklahoma.

5. Respondent faxed a letter concerning a case in which she was not representing either party, to Judge Michael D. Lee, the morning the case was scheduled for trial. The letter to Judge Lee was on letterhead entitled "Stop Child Abuse Now" ("**SCAN**") which contained Respondent's roster phone number, fax number and was signed by her. Respondent testified she sent the letter to counsel for the parties in the case, however, counsel for both parties testified neither one of them received such a letter from Respondent.

6. Respondent encourages lay persons to make ex parte contacts with Judges in pending matters.

7. Respondent did not conduct an investigation prior to the scan [sic] letter being faxed to Judge Lee.

8. Judge Michael Lee was not prejudiced by the **SCAN** letter.

9. Respondent had a good faith belief in the truth of the statements contained in the **SCAN** letter.

Conclusions of Law

10.The constitutional issues argued in this case are beyond the purview of the Trial Panel, *State of Oklahoma ex rel, Oklahoma Bar Association v. Porter, 766 P.2d 958, 962 (Okla 1988).*

Recommendation

The salient issue for this Trial Panel to determine is "whether the Rules of Professional Conduct ("**RPC**") apply to Respondent, who was not representing a client in the capacity of advisor, advocate, negotiator, intermediary or evaluator", but used her education and training as a lawyer, to send an unsolicited letter to a District Judge regarding a pending matter involving an allegation of child abuse in a child custody matter. At first blush, it would appear lawyers are lawyers twenty-four hours a day and therefore conclude Respondent, acting in any capacity, was and is guided by the **RPC.** However, a close reading of the **RPC** fails to support this conclusion. In addition, the Trial Panel did not find support in the American Bar Association's ("**ABA**") formal opinion 336 issued June 3, 1974, which stated "A lawyer, whether acting in his professional capacity or otherwise, is bound by applicable disciplinary rules of the Code of Professional Responsibility." (DR1-102(A); EC1-2). Even though the **ABA** has been staunch in its position that a lawyer must comply at all times with all applicable disciplinary rules of the Code of Professional

Responsibility, whether or not he's acting in a professional capacity, the Supreme Court of Oklahoma has not adopted such a position.

Therefore, since the Supreme Court of the State of Oklahoma has heretofore not addressed this issue, the Trial Panel lacks direction on what course to pursue. Additionally, the Respondent has raised certain constitutional issues which, as stated in *Porter,* are beyond the purview of the Trial Panel and must be decided by the Supreme Court. Consequently, the Trial Panel defers to the Supreme Court of the State of Oklahoma for a decision on the constitutional issues raised by Respondent and its resulting impact upon the **RPC**. The Presiding Master has been authorized to report Judge Michael Burrage and Gene Olson concur in this opinion.

/s/_____
Mark W. Dixon, Attorney Panel Member
and Presiding Master

APPENDIX C

1c

STOP CHILD ABUSE NOW
P.O. Box 2046 Muskogee, Oklahoma 74402

682-4226
686-0180 455-3851
687-1416
655-3276

September 21, 1995

Judge Michael Lee
LeFlore County Courthouse
Poteau, Oklahoma

Re: Perry vs. Perry,
LeFlore County Case No.
JFD-91-619

Dear Judge Lee:

The undersigned include but a few of the members of SCAN, an organization active in monitoring the child protection system in Northeastern Oklahoma. Our experience, like that of dozens of other grass roots groups throughout the nation with whom we network, is that the child protection system generally and usually fails abused children, and fails them miserably. Sadly, Ryan Luke was no anomaly.

Specifically, in this case, we have become alarmed about the dysfunctional role being played by the LeFlore County Child Welfare. We have become aware that the six year old boy who is the subject of this litigation, initially disclosed to the child welfare worker, Marilyn Van Bockel, that his maternal grandfather was sexually abusing him. There is evidently also a ten year old half-brother and an older boy who act out sexually in or about the maternal home, and have at times sexually abused the six year

old. It appears that typically massive efforts are being used to conceal or trivialize the involvement of the maternal grandfather, a former member of the Sheriff's office. Certainly a person's economic or political status has no probative impact as to the likelihood that he or she is a sexual offender; but such status may well impact the difficulty in rendering such person accountable for his or her acts. We recognize that making decisions that truly have the power to save a child, require an unusual degree of judicial courage and we applaud all of your efforts in this case.

Neither courage, competence, nor integrity, however, are qualities we have found demonstrated in DHS's actions in this case. Not only did the worker fail to take steps to protect the child after he disclosed abuse to her, she next attempted to contaminate the disclosure process already being handled well by trained professionals, she deliberately set up an interview between the child victim and one of the alleged perpetrators, and then enabled the alleged perpetrator to run with the child. DHS has also made no effort to date, to our knowledge, to safeguard the ten year old child still with the alleged perpetrators, still acting out, still not in therapy.

Aside from the foregoing, Judge, incredible as it seems, your very cautious temporary order in which contact with the alleged perpetrator mother was to be supervised, is being disregarded and sabotaged by those individuals at the Youth Services Center who are evidently charged with enforcing it. Our concern, of course, in cases such as this, is that the lack of supervision creates not so much an opportunity for re-molestation as it does an opportunity for subtle threats and manipulation of the very fragile, recently disclosing child, who has had a very strong, but unhealthy, bond with his abuser.

It would be wonderful if children could go through abusive childhoods and then, as adults, obtain therapy that allowed them to live normally. Unfortunately, this does not usually happen. The literature tells us that we probably have but one chance to stop this child's emerging deviance and that chance is right now, following disclosure. As a society we cannot afford the problems

we will create for tomorrow if we betray those who are helpless and crying out today.

Our concern in the above referenced litigation, as it is in all litigation involving abused children faced with court ordered re-victimization, as is being requested by the alleged perpetrators, is that the safety and well-being of the child be given highest priority. In particular, we are concerned that the best interests of the child truly be given greater weight than is any parental "right" of unsupervised access. Our experience, unfortunately, is that the "right", or more accurately, the privilege, of a parent to access is usually seen as more important than is a child's right to be safe. In this regard we feel that extraordinary attention needs to be paid to the observations and opinions of children's therapists, particularly those who have documented professional training and experience with incest and family violence, both with victims and abusers. Attached for your reference is a news article that reflects the enlightened changes in judicial attitudes toward "family reunification".

We urge you to use the utmost of caution in weighing the interests not only of this six year old boy in having a childhood free from further sexual abuse, but also the rights of the other little children in the community with whom he will be in contact, to be free from the typical sexually reactive behaviors now commonly seen on every schoolyard.

We hope to maintain a mutually supportive relationship with you as well as other members of the bench and are happy to provide current literature on virtually any topic involving family violence and custody litigation with abuse allegations. Please do not hesitate to contact us.

Sincerely,

/s/Katherine Hine
/s/Edward L. Holder
/s/Marjorie Holder
/s/Vicky Wrege
/s/Jerry Wrege
/s/Sandra Stiles
/s/Angela Conley
/s/Norman A. Sell
/s/Betty A. Black

APPENDIX D

1d

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel. Oklahoma Bar Association, Complainant,	)	OBAD No. 1240
v.	)	
KATHERINE HINE, Respondent.	)	

RESPONSE

COMES NOW the Respondent, Katherine Hine, and in response to the Allegations of the Complaint, respondent alleges and states as follows:

1. That respondent admits the allegations contained in paragraphs 1, 3 and 4 of the Complaint.

2. That respondent denies the allegations contained in the first sentence of paragraphs 2 of the Complaint.

3. That respondent admits the allegations contained in the first three sentences of Paragraph 5 of the Complaint and denies the allegations contained in the last sentence of paragraph 5.

4. That respondent denies having knowingly made any false statements of fact as alleged in Paragraph 6 of the Complaint, demands strict proof not only of the alleged falsity but also of respondent's alleged actual knowledge of such alleged falsity, and admits that the partially quoted phrase contained in paragraph 6 does in fact come from the letter referred to in paragraph 5 of the Complaint.

5. That respondent denies all allegations contained in Paragraph 7 of the Complaint, but admits that the partially quoted phrase contained therein does in fact come from the letter referred to in paragraph 5 of the Complaint.

6. That respondent denies all allegations contained in Paragraph 8 of the Complaint.

AFFIRMATIVE DEFENSES

1. That none of the paragraphs of County I specifies which alleged conduct is violative of which specific provision(s) of the RGDP.

2. That the Complaint is void for vagueness as it fails to specify which alleged conduct is objectionable under Rule 3.3 and also fails to specify which subdivision of Rule 3.3 respondent is being accused of violating.

3. That the Complaint wholly fails to specify what conduct it is that could arguably violate the RGDP #1.3, and respondent further states that such rule is void for vagueness and overbroad as it would purport to apply to respondent's conduct. Which conduct it is that could arguably violate Rule 1.3, and respondent further states that such rule is voids for vagueness and overbroad as it would purport to apply to respondent' conduct.

4. That paragraph 6 of the Complaint fails to make any factual averments whatever to support its conclusory language that respondent "knowingly made false statements of fact", thereby depriving respondent of her due process rights.

5. That paragraph 6 of the Complaint is unconstitutionally overbroad in that it impermissibly seeks to accuse respondent of knowingly making false statement [sic] in addition to the one contained in the partially quoted material, without ever specifying what those other statements might be. The respondent submits that she should not be required to answer allegations the nature of which is merely insinuated and not specified, and states that her rights under [sic]14th Amendment to the U.S. Constitution are violated by such practice.

6. That the allegations of paragraph 5 of the Complaint reveal that the delivery of the complained of letter was accomplished consistently with the provisions of Rule 3.5(b)(1) and is therefore not improper.

7. That respondent affirmatively avers that copies of the complained of letter were sent and were made immediately available to both counsel not only by respondent but also by the Judge and that the delivery of said letter was therefore accomplished consistently and substantially in conformity with the provisions of Rule 3.5(b)(1).

8. That the prohibitions of Rule 3.5 are not directed toward attorneys such as respondent whoa re not representing individuals with a personal stake in the litigation and that respondent's actions do not fall into any category of conduct that Rule 3.5 has ever intended to address.

9. That Rule 8.4(d) is unconstitutionally vague, vague as applied to the alleged actions of the respondent and is overbroad in that it is impossible for attorneys to assess what forms of constitutionally protected expression, if any, will be deemed acceptable, or prejudicial to the administration of justice. That complainant's attempts to subject respondent to sanctions or purported violations of Rule 8.4(d) deprives her of her rights under the First and Fourteenth Amendments to the United States Constitution.

10. That the prosecution herein of the respondent is unlawfully chilling not only of the respondent's law reform activities protected under RPC #6.3 and the U.S. Constitution but also of the constitutionally protected free expression right of other members and potential members of the organization SCAN and other law reform citizen groups who may have attorney spokespersons, and of attorneys who might otherwise be spokespersons for such groups.

11. That the complainant is attempting to sanction respondent for acting in accordance with the highest ethical principles, i.e., those set forth in EC 9-1, as the complained of letter was an attempt to assure that judicial decisions profoundly affecting the safety of a

child would be based on more unbiased and scientific information than that normally made available by attorneys for the battling parents.

12. That complainant's actions if upheld, constitute an unlawful and dangerous attempt to place a ban not only on the tradition of amicus curiae participation in litigation of public interest, but also a ban and prior restraint even upon preliminary efforts of citizen [sic] to obtain judicial permission to appear as amicus curiae. That such action colorably under State law cannot be tolerated in a free society.

Respectfully submitted,

KATHERINE HINE, OBA 10075
Attorney at Law
508 Crabtree
Muskogee, Oklahoma 74403

APPENDIX E

1e

June 19, 1996 Transcript, pp. 189-200
Cross-Examination of Judge
Michael D. Lee

Q. Yes, Judge, I'm Katherine Hine. I'm the one that was objecting earlier. Let me ask you this: Have we ever met, to your knowledge?

A. To my knowledge, no, we have not.

Q. Okay. So that would mean I've never practiced law before you?

A. Not that I can - - No, I don't think so.

Q. Okay. I take it from your testimony that I have essentially no credibility with you; would that be fair?

A. I'm not sure I understand the question.

Q. Just because I say something is true, doesn't hold any particular sway with you, does it?

A. That doesn't mean I think it's true or untrue.

Q. Right. Not one way or the other.

A. Right.

Q. And you had no reason particularly just because I signed my name to a letter to be - - to believe that what was in there was especially true or not true?

A. No, I didn't.

Q. Okay. Same question as to the other signers. Just because they signed, you didn't have any reason to have any particular weight to the letter because of a particular signature on that letter.

A. The weight has several meanings. As far as whoever's signature was on there, as far as whether I believed it or not, no that doesn't make any difference. The fact that it had your signature and you were a lawyer bothered me immensely.

Q. Initially, you didn't like the letter, you thought that the letter was improper, and that occurred before you knew that any of the

signatories were - - that I was one of the signatories and that I was an attorney?

A. That's right, yes.

Q. Okay. The letter had a third page which was a copy of a newspaper article?

A. Yes, uh-huh.

Q. Okay. Any anything about that that bothered you?

A. I can't really say anything about that bothered me.

Q. Okay. Do you know Judge Taylor that was referred to in that newspaper article?

A. Yes, I do.

Q. Okay. But that didn't unduly influence you?

A. No, huh-uh.

Q. Okay. I take it that - -

A. I agree with Judge Taylor on some things and disagree with him on some things.

Q. Okay. I take it you didn't find out that I was a lawyer until Belva Barber indicated that; is that correct?

A. I don't recall her saying anything about it.

Q. But - - Do you have the letter in front of you by any chance now?

A. Yes. Uh-huh.

Q. Okay. Is there anything in the letter that would have indicated or any representation that I was a lawyer in the letter?

A. No. No. There is not.

Q. Were there any efforts to make a determination if any of the other signers were lawyers?

A. Yes. Yes. I have a computer program that you can run phone numbers, you run names, find out people's addresses, so forth. And I checked all of these names and all the phone numbers on the first page.

Q. Okay. So then, did you determine who these people were?

A. I determined that one of them lives down here in Wister. One

of the phone numbers is a Wister phone number.

Q. Which one would that have been?

A. Oh, right offhand, I really don't remember. I didn't make any notes.

Q. Are you referring to one of the phone numbers at the top of the letter is a Wister phone number?

A. Yes.

Q. Okay. But, none of the individuals who signed were residents of LeFlore County at all, were they?

A. Not that I recall. I really don't remember that.

Q. Okay. Were there any efforts taken that you are aware of to take any legal action against the other individuals because of the letter?

A. Not that I'm aware of, no.

Q. Do you feel like that something like that might be appropriate?

MS. HUBBARD: Your Honor, I'm going to object. I don't believe that that's a relevant question.

MS. HINE: Well, it goes toward an equal protection argument. It goes toward whether something that is proper by one person may be improper by someone who has a law degree, who has a license to practice law, but is not acting as an attorney in the case.

MS. HUBBARD: That's certainly something that she can argue. But as far as asking this particular witness, who happens to be the judge in the matter, I think it's inappropriate.

MR. DIXON: Judge, I'm going to sustain the objection. You don't have to answer it.

THE WITNESS: All right.

Q. I can't remember. Was it your testimony that you did become upset around the same time that the lawyers did?

A. Yes. I became upset in that it bothered me that someone would attempt to influence me. I didn't get visibly upset like they did. They got very angry.

Q. Okay. And of course, you read the letter a little bit before they did to yourself, correct?

A. That's correct.

Q. So you had an opportunity to react a little quicker?

A. Yes.

Q. I take it as a judge you have occasion to rule on suppressions of evidence and have in front of you various items of inadmissible evidence, and then go on and decide the merits of a case, do you not?

MS. HUBBARD: I'm going to object, Your Honor. I don't know how that question is relevant to the Bar Association's grievance today.

MS. HINE: This issue has come up before in that the nature of the letter contains admissible evidence, and there are - - there is case law to the effect that that is one of the factors to be considered in deciding about prejudice. If the content of a news flash or a communication to a judge is admissible evidence, that is one of several factors to be considered. I'd like to have the factual issue on that resolved.

MS. HUBBARD: What prejudice are we talking about?

MS. HINE: 8.4(d), and 3.3(a)

MS. HUBBARD: Your Honor, I'm not sure that the prejudice that she is referring to is what is required by the rules she just stated.

MS. HINE: We are talking about undue influence here. It becomes substantially less undue influence if we're talking about matters that could be heard by the Court in any event that is admissible evidence.

MR. DIXON: I'm going to overrule the objection.

You can answer the question, Judge.

THE WITNESS: All right. The answer is yes, I have had to rule on admissibility of evidence and so forth.

Q. You have had prejudicial evidence in front of you that was inadmissible and then you have gone ahead and ruled on the merits?

A. Yes.

Q. Have you ever before the SCAN letter gotten letters from the public about a case?

A. Not before the fact, no.

Q. You never have?

A. I haven't.

Q. You have been on the bench how long now?

A. Since 1984. 12 years.

Q. And you have never gotten letters regarding - - right before you were going to sentence somebody in a criminal case?

A. Well, yes, I've got letters like that.

Q. Okay. You've gotten letters from prisoners?

A. Yes, uh-huh.

Q. Okay. Have you got impolite letters from the public?

A. I got a very impolite letter one time after I set a bond on a guy.

Q. Okay. Have you gotten angry letters from the public?

A. Yes.

Q. Have you gotten letters from people expressing their personal philosophies?

A. Most of those were after I had made rulings, though; except, like you say, prisoner letters and those kinds of things.

Q. Okay. Have you gotten letters from folks claiming friendship in high places?

A. I don't think so.

Q. Just one last question like that. Have you gotten letters from people claiming to be LeFlore Country voters?

A. No. But I've had comments made. I tell them I don't run for election.

Q. In fact, because you are a special district judge, would it be true that you serve at the pleasure of the district court judge?

A. I think the statute says district judges.

Q. Okay. So you are sort of insulated from - - from public - from rabble-rousing kinds of activities; would that be fair to say?

A. Yes. In a way, yes.

Q. Was there any possibility that Perry versus Perry would have become a jury issue?

A. Only if there had been some kind of contempt matter filed.

Q. Okay. And to your knowledge, was the letter made public at all, like to the newspaper to where it could have contaminated a jury panel?

A. Not that I'm aware of, no.

Q. You did order supervised visitation in August of '95; is that correct?

A. Yes.

Q. If supervision fails for some reason, would that be something that you would want to know about?

A. Yes.

Q. Okay. Do you generally agree that it is up to courts to safeguard the interests of children, particularly in cases that come through the courts?

MS. HUBBARD: Your Honor, I'm going to object, again, as to the relevance of what the line of questioning that she's going down.

MS.HINE: The relevance is there are also in the Rules of Professional Responsibility - - Professional Conduct rules that require certain actions to be taken by lawyers, such as their ethical

considerations. The comments to Rule 8.2 talk about helping insulate judges from unwarranted criticism, they talk about helping judges to arrive at informed decisions. That's in 3.3(d).

If that applies, which I have an argument on that, and there is also Rule 3.6's safe harbor provision that would allow certain disclosures even to the news media.

MR. DIXON: Judge, I'm going to go ahead and overrule the objection. You can answer it.

WITNESS: All right. Yes, I think judges have a statutory duty to protect the children. Look out for the best interest of the children.

Q. Do you think that the interest of a child in being free from abuse is a liberty interest?

A. What about those terms.

Q. I'm talking about something that is constitutionally protected.

A. I would have to think on that. That in those exact terms has never been raised to me before.

Q. Do you think that a good faith argument could be made that it is?

A. Possibly, yes.

Q. Do you agree that it generally takes adults to protect children from abuse? They can't protect themselves?

A. Well, not properly. They want to defend themselves if there is no adult there.

Q. Were you prejudiced by the SCAN letter?

A. I don't think so.

Q. Was an attorney appointed in the Perry versus Perry case specifically for the child?

MR. DIXON: Judge, are you still there?

THE WITNESS: Yes. Yes, I am.

MR. DIXON: Did you hear the question?
THE WITNESS: The last question I heard, was there an attorney specifically appointed for the child?
MR. DIXON: We didn't hear your response.
THE W ITNESS: I said no, there was not.

Q. Was there a guardian ad litem or a causa [sic] - -
A. No, there was not.

MS. HINE: I have nothing further.
MR. DIXON: Anything further?
MS. HUBBARD: No, Your Honor.

* * * * * * * * * * * *

June 19, 1996 Transcript, pp. 293-298
Direct examination of Dianna Carroll

Q. Would you state your name for the record, please?
A. Dianna Carroll.
Q. And you reside in what city?
A. I reside in Oklahoma City.
Q. Okay. And are you a member of certain organizations that deal with child protection?
A. Yes, I have been.
Q. Okay. What are those organizations? If you will speak up. I think we're having a little trouble with ventilation system hearing everybody.
A. MASA, Parents Alliance.
Q. Are you also a member of the State Post-Adjudication Review Board?

A. I've been nominated for the State Post-Adjudication Review Board, and turned down a nomination.

Q. Okay. Who is on that?

A. The State Post-Adjudication Review Board?

Q. Yes.

A. There is several judges, approximately three or four laypeople and the current chair is Maxwell Pembrook from Warwick, Pat Lowery.

Q. Who nominates you for that?

A. The State Commission on Child and Youth Services actually nominated me.

Q. And you have received special training in areas that touch on child abuse issues. What is that training?

A. I was trained in Washington, D.C., several times, during the Washington D.C. law enforcement conference, juvenile justice center there. I've been trained in formal education. I've been trained by various other avenues including law people, law enforcement.

Q. You are in the process of finishing a master's degree in what areas?

A. In psychology and criminal justice.

Q. Okay. And are you nearing completion of research on the issue of children, abused, children in Oklahoma and how they are dealt with in the child protection system?

A. Yes. This is a four-year research program, study, put together over 400 children, statewide. And it came out to eight areas where children fall through the cracks in the system.

Q. And is that study to be published in the fall?

A. Yes, it is.

Q. You have received a national award?

A. Yes. I received a national award in 1993 for my work in the field of child intervention, child abuse, by Marilyn Berringer Atler Foundation in L.A.

Q. And what is MASA that you mentioned that was one of the groups you were affiliated with?

A. MASA is a national organization that's called Mothers Against Sexual Abuse. They have over 21 states, and I was the chapter executive director for Oklahoma until '94.
Q. Okay. In your capacity, working with MASA, have you also become familiar with the activities of other child protection groups?
A. Yes.
Q. Okay. Are you familiar with the problems that the child protection groups have?
A. Yes, I am.
Q. Okay. You've been working in child protection with child advocacy groups for approximately how long?
A. Since 1989.
Q. Okay. Are some of the groups that you are affiliated with, do they have attorney participation?
A. Yes.
Q. Okay. Are some of the groups that you either network with or are affiliated with, do they lack attorney participation?
A. Yes.
Q. Okay. Is there a difference in how the two types of groups can function for certain children?
A. Yes. The organizations like the Child Advocacy Center here, Jill Carson is a member of, is a much more functional, they have more power to get things accomplished, than the ones who are able to have attorney participation. Because many times, unless someone like I have been - - who is trained in the legal system and networks in the legal system or law enforcement, they - -
Q. I'm sorry?
A. They hit a brick wall. They have no way to actually have participation that may be necessary concerning children.
Q. Is raising the consciousness of the general public about issues of child abuse part of a typical mission of most child advocacy groups?
A. Yes.
Q. Okay. How would attorney participation hinge on that, if it would?

A. Attorney participation can consist of many things, which is providing information to the groups as to what their restrictions or guidelines are. They can also guide us in how to contact the appropriate people and provide the appropriate information to whom.
Q. Are there difficulties that groups - - the child protection groups have in obtaining attorney participation?
A. Yes.
Q. If so, what is that difficulty?
A. The - - I'm going to give some very candid information here. The truth is it 's very hard when attorneys get involved with any type of child advocacy group or children's issues, even if they're not involved with the group. They come under fire very frequently. We have attorneys holding seminars on how to defend a pedophile, which includes how to dissect the child on the stand. And nobody touches them with a ten-foot pole. However, if someone tries to come forward in behalf of children, they get their hands slapped, forewarned. It's just not worth it.

It can hurt many other things, reputation among the Bar, among the people of their own career field. It's just one of those things that they don't do. It's a no-no.
Q. Have you had specific experiences in which attorneys have refused to participate in child advocacy because of their fear of sanctions?
A. Yes.
MS. HINE: Nothing further.

June 19, 1996 Transcript, pp. 314-316, pp. 321-323, Direct examination of Linda Palmer

Q. And during the course of providing therapy, did information come to you regarding the interviewing that was done of the child by DHS which concerned you?
A. Yes.
Q. Okay. What was that?

A. The father told me that he was very concerned that the DHS worker had taken the child and interviewed - - the child had told me, and he had told his physician, that he had been molested on one occasion by his mother, that she had stuck her finger up his rectum. Of course, that's not the word he used. He used child's terminology.

And he had not initially told DHS that they were the first people to interview him, but he had told, like I said, first the physician and then I was the third person that interviewed him and he told me. It was spontaneous. He told me.

I was talking with DHS and letting them know that I had interviewed the child and what my findings were, because they had called. We were comparing notes. And Ms. Van Bockel, I think her name was, had indicated the child had not told her that his mother had molested him. And so she says, I'm going to re-interview him.

Well, she did so, but she did so with him sitting on his mother's lap. And he recanted. And that is entirely outside the guidelines of APSAC. I just can't imagine. That is just not good practice.

And the father was very upset about this, and I concurred that it was uncouth, it was not clinically correct, and had probably damaged the child.

Q. When the child would come to you, did he vocalize about his feelings about the DHS worker"

A. Yes. He kept asking me if she was there. I had to reassure him like or [sic] two or three visits afterwards that she wasn't there, that she wasn't going to be there. Finally I just asked him, what is the deal with this?

Q. Is it unusual for a child who's been interviewed about sexual abuse, by a DHS worker, to then develop; kind of a phobia about that worker? Have you seen that before?

A. No. That's the first time. In fact, they usually consider the DHS worker a friend, an ally, for the most part.

Q. That was an unusual experience for you to see?

A. Yes.

Q. Okay. Following the Court's allowance of supervised visitation to the mother in the Perry case, did you continue to see the child and did you notice that anything about the child or his disclosures changed after the supervised visitation went into effect?
A. Well, at one point, he said that his mother and brother had not molested him, and he became more reticent about talking about it. And he finally just said, my mother told me not to say this anymore, that I need to quit talking.
Q. And do you feel like that that's damaging to him?
A. It was. It made him feel very guilty at the time. . . .

* * * * * * * * * * * * * * *

Q. Looking at the third paragraph of the letter, is there any - - as to those allegations, do you have an opinion as to whether or not there is - - there was grounds to believe that those statements at the time they were made were accurate?
A. I think that DHS's actions in this were at best - - when they interviewed the child, in my opinion, they were at best incompetent, and at worst perhaps bowing to political pressure. I don't know.

It just wasn't - - It just wasn't standard clinical practice to ask a child, while sitting on his mother's lap, if she'd molested him. That's not ever common sense.
Q. Calling your attention to the last paragraph on the first page, the allegations that are contained in that. at the time they were made, were you aware of whether or not there was reason to believe that those statements were accurate?
Mr. Perry had called and he was very upset because Youth Services was allowing the mother to go into a closed room with the child, while we had this ongoing court case, and visit with him without anyone even being able to see them. And he had protested, and his statement to me was that they had told him that they could not interfere with the visitation process.
Q. Whatever they did, would that fairly fall under the term "supervised visitation" as you understand it to be?

A. No. They couldn't even see him, much less they couldn't hear, you know.

June 19, 1996 Transcript, pp. 217-218
& pp. 224-227, partial direct examination
of petitioner

Q. That's true. I just want to make sure that that's what you have reference to when you say you had some background for preparing the letter of 22nd of September. Is this part of what influenced you in that preparation of the letter of 22 of September?
A. Yes; but not in the way you might intend. We get a lot of information, like I said, from a lot of different groups.

Respondent's Exhibits 4, 5, and 6 come from three different organizations, and I think it's pretty clear which organizations from the exhibits.

I would say that those represent a very extreme position that certain child advocacy groups have taken towards judges who decide post-divorce child custody cases.

In the sense that I am very concerned about the very extremeness of the positions taken in these articles, I can say that that influenced my preparing the SCAN letter, because I wanted to be of assistance to a judge in such a case in helping him to make an informed decision that would not open itself up to the kind of criticisms that are found in 4, 5, and 6.
Q. In other words, you are trying to assist the Court rather than be party to disrupting the Court?
A. I was not attempting to influence the Court to make a decision one way or the other. I was assisting the Court to simply be aware of certain information that I had which clearly was not two-sided because I did not have the benefit of both sides. I had some information. And I felt that if I did not present it, it very easily could -- might be overlooked, and should not be in the interest of the child.

****

Q. But as far as an outcome in this particular case, what was your objective?
A. There was no specific outcome that I was looking to. I was concerned about the welfare of the child. I was concerned that the knowledge - - that the information that was out there and available be looked at.

I'm also concerned about false allegations. I'm also concerned about supervision for the protection of the person that's supposed to be the danger to the child, because I think it protects there, too. I was concerned about that. And concerned that there would be a free flow of information about that.
Q. Well, did you attempt to let the Court know in that - - in that letter, that there were other interests besides this particular child?
A. Those were my concerns as well as this particular child, and that is - - that other cases in that county have potential of being mishandled. Other children perhaps would be subjected to improper interviewing techniques. If this can happen in one case, it could happen in many others. I was very concerned about that and felt that that should be brought to the attention of the person who was in a position to do something about it.
Q. Okay. Now, it does say in two places except as permitted by law or others authorized by law. What authorization by law or acceptance by law were you relying on?
A. Ethical consideration 9.1 dictates that a lawyer should promote public confidence in our legal system and in the legal profession. I was very concerned about the growing hostility, if you will, of the public toward the bench. I think we've seen a lot of that just from the O.J. Simpson trial.

I mean, it's just - - it's a subject that the Bar has addressed in our journals. It concerned me. It concerned me that certainly the issue of judicial training is a very hot issue and has been address by our Legislature, and I wanted to see that this particular judge would not be a sitting duck for those kinds of attacks.
Q. Is the subject of child abuse and referral a specific topic of statutes - -

A. I definitely felt that this was a child abuse reporting issue. Although that statute may refer to reporting to DHS, and I was aware that a report had already been made to DHS, and perhaps there was going to be another, as a result of my conversation with Belva Barber, another report to OCCY which is supposed to be the watchdog group over DHS appointed by the Governor. They have no enforcement powers.

There was really the only logical choice to oversee a malfunction in DHS would have been a sitting judge in that county. In particular in a case in which the malfunction was occurring or could have been occurring.

Transcript of June 19, 1996, pp. 343-353
Petitioner's argument to Trial Panel

I would refer the Court to the language that the Oklahoma Supreme Court has used in the 1988 decision of OBA versus Porter, which also dealt with some free speech issues. It definitely dealt with attorney speech, although it was in the context of a newspaper. A black attorney referred to a federal district judge, in the newspaper, as being a racist.

The Oklahoma Supreme Court declined to censure him in any way. And stated - - and this I think is a guideline for this Panel - - "This court has always looked at the nature of the accusation and has carefully avoided censuring attorneys for speech in the absence of a showing of falsity." And I think the rule - - in fact, even the language that the Complainant uses in the complaint makes it clear that falsity in and of itself is not sufficient; knowing falsity is. And there's been a complete absence of proof in that regard.

The factual allegations in the letter, as the evidence shows, are true. There was every reason in good faith to believe that there was evidence supporting them. Complainant and its witnesses were evidently not of the same mind as to the generally accepted meaning of the term "supervised visitation" as is typical

in this complaint. In this case, Complainant wants you to believe that where there is a dispute, that the OBA - - the OBA's version is the preferred version. That simply is not the case, as earnest as they may be in their belief.

In referring to the contents of the speech, the Complainant says that the content of the speech is irrelevant, that the Constitution awards protection or denies protection to political speech, which is defined in the decision of Gentile versus Nevada State Bar to be basically speech that criticizes government, which this was; that that sort of speech stands on the same constitutional footing as, for example, the speech in - - I believe it's the lawyer advertising case, the Bates case, commercial speech. And of course they do not.

Even commercial speech, though, in the Bates case is protected and is entitled to constitutional protections under the First Amendment. To a large degree, the reasoning in that court was that lawyer advertising could not be sanctioned because by sanctioning it, there was a restriction of the public access to the courts or to government for redress of grievances.

But the decision in Gentile is clear that speech such as that which is contained in the letter has traditionally been recognized as lying at the core of the First Amendment, according to Justice Kennedy's decision.

The Oklahoma Supreme Court, again in the Porter decision, and also referring to the United States Supreme Court decision of New York Times versus Sullivan, says that, "Sullivan and its progeny places rather less stress on the social utility of shielding a public official from criticism and more emphasis upon preservation of the integrity of the institution, rather than the personality occupying that office."

In Gentile, the Court recognized the criminal defense attorney's statements in the press accusing government agents of criminal activity was protected as political speech.

Surely, in commenting that it is hard to imagine an issue that has higher - - well, what Porter says is, "Plainly it would be

difficult - - this is quoting newspapers - - "it would be difficult to single out any aspect of government of higher concern or importance to the people than the manner in which criminal trials are conducted in." That case, of course, there was a danger of pretrial publicity affecting a jury. People who were not trained to disregard inadmissible evidence.

And I would say that there are a lot higher priorities than how we conduct criminal trials. If ever there was one, it's how we protect our children, our future.

The rule that prohibits conduct that is prejudicial to the administration of justice, 8.4(d) does not punish an attempt, which I don't think the evidence justifies that there was an attempt to prejudice the administration of justice. But if so, it would be constitution - unconstitutionally overbroad because it's so vague. It does not specify what type of conduct prejudices the administration of justice, particularly as here, where there's a judicial finding of no prejudice. Judge Lee told us he was not prejudiced. And it's overbroad as applied to nonadvocate attorneys, such as the position that I was in in that case, because - - there is a strong policy reason for that.

When we have nonadvocate attorneys, we don't have the credibility or the inflated credibility of someone who is an actual lawyer in the case, making a newspaper statement, I know this and I know that, because I'm privy to inside information, because a nonlawyer - - even a lawyer who was acting as a nonlawyer and has no insight [sic] information because of not representing the litigant is not in the position. And clearly Judge' Lee's testimony also supported that there was no particular undue influence remotely possible because there was no - - there was no personal - - there was no particular credibility on the part of any of the signers of the letter.

If there had been a danger of unfair influence, one would think that the motion to disqualify would have included that. One would think that the judge, sua sponte, would have responded to that. That did not happen. There are very sound reasons for that.

We have traditionally expected judges to be resilient from all sorts of influences that they may be subject to, and I enumerated a number of communications, letters, that this particular judge, as all judges do receive all kinds of letters, some polite and some not so polite. But they're trained to disregard that.

And there is also some authority, I won't go into detail on that, but that is bench trials, in fact, I think it's the Hirschkof [sic] case from the Fourth Circuit that indicates that the 8.4(d) type of rule is not applicable when you are dealing with bench trials. The prejudicial to the administration of justice is really intended for pretrial publicity, before a jury trial.

In connection with that, I think the rules have got to be read together and Rule 3.6, the safe harbor portion of Rule 3.6 says that a lawyer may state without elaboration a warning of danger concerning the behavior of a person involved when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest. That's what Gentile calls the safe harbor provision of the pretrial publicity rule. The purpose of it is to take away the vagueness problem.

The first part of the rule talks about one, two, three or however many there are, these are the kinds of pretrial statements we don't want to see attorney speech in this area because it carries almost a presumption of being prejudicial.

Next, you go down to the safe harbor provisions, and it says look - - and the Gentile decision said if that attorney arguably fits his conduct under the safe harbor provision, then he has a right to expect that he will not be censured for his speech, that - his political speech.

It can hardly be said that if the right exists to publish what was in the SCAN letter in the newspaper, that the SCAN letter cannot constitutionally find its way to the judge.

One of the comments to Rule 8.2 states lawyers are encouraged to continue traditional efforts to defend judge who are unjustly criticized. And there is similar language in ethical consideration, I think it's 9.1 about helping judges and also the

requirements of the 3.3(d) that talk about giving material facts and so forth to judges.

The argument is Rule 3 doesn't apply, any of Rule 3 doesn't apply. But if it applies, in the context of 3.5(e), then it sure applies in the context of an obligation under 3.3(d).

3.3 - - 5, if it were found to apply to a nonadvocate, which there is no authority, case law or otherwise to suggest that, if you look at the comments, it's clear, it's not intended to so apply. The language of it talks about opposing counsel. But it if did, the rule does not specify making delivery by certified mail.

I certainly testified about mailing. I cannot absolutely prove that I mailed it, but my testimony is controverted by circumstantial evidence from the witnesses that they did not receive the copies of the letter.

You're going to have to look at whether or not we can base discipline on whether or not there has been a failure to perform a futile act when it bears on First Amendment issues.

I think there is also a substantial issue as to reporting of abuse. And abuse can consist of a gross disregard for the investigation of child abuse.

I'm getting close to the end here.

In language that strongly foreshadows the reasoning of the United States Supreme Court in Gentile versus Nevada, which came in 1991, Oklahoma Supreme Court Justice Hargrave went on to say, "There is practically universal agreement that a major purpose of the First Amendment is to protect the free discussion of governmental affairs." And that, of course, is referring to attorneys' speech.

He quotes - - also quotes Thornhill versus Alabama, "The freedom of speech in the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment."

Attorney Porter's speech, which consisted of telling the newspapers that a federal judge was a racist was, quoting the opinion, "plainly at the center of the protective umbrella of the First

Amendment." "Freedom of speech," quoting from the opinion "press, assembly, the right to petition the government for a redress of grievances, share a common core purpose of ensuring freedom of communication on matters relating to the function of government."

Who else but Judge Lee could have been petitioned to effectively redress grievances about how the government of LeFlore County, the child welfare function, when it came to the welfare of that county's youngest and most vulnerable citizens?

APPENDIX F

1f

Petitioner's Brief to
the Oklahoma Supreme
Court, pp. 18-29

PROPOSITION III: COMPLAINANT FAILED TO PROVE BY CLEAR AND CONVINCING EVIDENCE, CONSISTENT WITH THE FIRST AMENDMENT, THAT RESPONDENT VIOLATED RULE 8.4(D)

Oklahoma's Rule 8.4(d) prohibits a lawyer from engaging "in conduct that is prejudicial to the administration of justice." There are very few guidelines as to what may be considered "prejudicial" other than prejudicial to the trial process. As Rule 8.4(d) requires that the conduct actually "is prejudicial", it would seem to be a fairly cut and dried conclusion that respondent's letter absolutely did not prejudice the trial process in Perry v. Perry, especially in light of the uncontroverted and well supported Trial Panel finding that there was no prejudice.

Many of the First Amendment cases dealing with lawyer speech, such as Porter and Gentile concern themselves with lawyer discipline arising from statements made to the press. In the Porter case the statements were critical of a federal district judge. In Gentile the statements were critical of the police department. Although complainant has continued in its brief to make unsupported and patently erroneous statements such as the assertion that respondent thought the SCAN letter was critical of judges (Brief, p. 21), it is not the judiciary, but rather the LeFlore County Child Welfare that the letter criticizes. Nowhere in the transcript does respondent refer to the content of the letter as "commercial speech", although complainant so states (Brief, p. 23). Despite the fact that respondent did not criticize judges, did not speak to the news media, and did not engage in commercial

speech, she submits that she is as protected by the First Amendment as were the lawyers being targeted for discipline in Porter, Gentile, and Bates v. State Bar of Arizona, 433 U.S. 350 (1977). Actually, more so.

Justice Kennedy's majority opinion in Gentile, at pp. 1034-1035, expresses concern over efforts of the Nevada State Bar to discipline attorney Gentile who was

> "engaged not in sdicitation of clients or advertising for his practice, as in our precedents from which some of our colleagues would discern a standard of diminished First Amendment protection. His words were directed at public officials and their conduct in office. There is no questkn that speech critical of the exercise of the Stae's power lies at the very center of the First Amendment. Nevada seeks to punish the dissemination of information relating to alleged governmental misconduct . . ." (Emphasis supplied)

Complainant's outrage that respondent brought to the attention of the Court "certain information" that one of the attorneys wished to have concealed (Tr. Pp. 161-163) is expressed in its brief (pp. 25-26) Clearly, the "certain information" pertained to the alleged misconduct of DHS or of Youth Services, misconduct evidently accepted in LeFlore County as the norm, but about which Judge Lee had as much right to hear, as respondent had to speak. Va. Pharmacy Bd. V. Va. Consumer Council, 425 U.S. 748 (1976).

The Gentile Court expressed a concern that there be contemporaneous publicity about criminal trials as an "effective restraint on possible abuse of judicial power" citing In re Oliver, 333 U.S. 257, 270-271 (1948) The Gentile Court also noted that the manner in which criminal trialsare conducted is of great

significant [sic] to the public, citing Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575 (1980). Respondent submits that the manner in which government protects (or fails to protect) its children is a matter of even graver public concern than is local criminal procedure.

Complainant harps in its brief about the timing of respondent's communication to Judge Lee. Yet the U.S. Supreme Court in Bridges v. California, 314 U.S. 252, 268-269 (1941) remarked that comment about pending cases is very

> "likely to fall not only at a crucial time but upon the most important topics of discussion . . . No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression."

In referring to N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) this Court in deciding Porter stated that a case such as Sullivan or any of its progeny

> "places rather less stress upon the social utility of shielding a public official from criticism . . . and more emphasis upon preservation of the integrity of the institution rather than the personality occupying that office." Porter at p. 965.

Complainant cites no cases in which lawyer extra-judicial speech protected by the First Amendment becomes unprotected if the speech merely reaches the particular judge, rather than the general public or a potential jury venire. Porter notes the

> "practically universal agreement that a major purpose of the First Amendment is to protect the free discussion of governmental affairs."

Porter at p. 966.

and the traditionally accepted view that lawyers are free to criticize rules of law without being deemed to have made an attack on the integrity of a particular judge or of the legal system. Porter at p. 965. Allowing discipline of such lawyers not only abridges the individual lawyer's First Amendment rights but also the rights of others who are thereby prevented from receiving information about the workings of their government form a speaker so situated as to be intimately familiar with the operation of the judicial branch of government. Porter at p. 968l. Part of these cherished First Amendment rights, as noted by Porter at p. 967 is the "right to petition the government for a redress of grievances".

As in other contexts, the First Amendment right of an attorney to speak freely (and critically) about governmental misconduct can run into conflict with other rights of equal stature, specifically those of the Sixth Amendment and its guarantee of a fair trail. Clearly in the case at bar, and as specifically found by the Trial Panel, there was no actual interference with or prejudice to the administration of justice. (Tr. Pp. 53-59, p. 200) Using the analyses of Porter and Gentile, whether the language is couched in terms of "substantial likelihood of material prejudice" or "clear and present danger", which have been termed "linguistic equivalents" in In re Hinds, 449 A2d 483 (N.J. 1982) complainant has produced no evidence to support an inference that the SCAN letter at any time posed such a danger to the administration of justice. Gentile and most other attorney speech cases that consider possible potential prejudice to the trial process involve criminal jury trial situations.

Respondent's research has revealed that there are a number of significant factors bearing on whether courts have protected attorney speech under the First amendment where the body seeking to impose discipline claims a prejudice to a specific trial process or to the administration of justice generally. Before

considering those factors it is important to reflect that respondent is not a second class citizen due to being a lawyer and has First Amendment rights of free speech. Hirschkop v. Snead, 594 F2d 356 (4th Cir. 1979). Rather than enjoying the usual presumption in favor of constitutionality, there is a presumption against the constitutionality of government rules such as Rule 8.4(d), to the extent that they tend to chip away at fundamental free expression rights. See cases cited at 16 C.J..S. Sec. 106. Although complainant argues that 8.4(d) usually withstands vagueness challenges, the caselaw cited by complainant (Brief, p. 16) contains no cases in which lawyer discipline was imposed under 8.4(d) where there were First Amendment issues. Hence complainant bears the burden not only of showing that Rule 8.4(d) applies factually to respondent's conduct, but also the burden of justifying the constitutional validity of imposing the rule, as by demonstrating a compelling state interest. The factors to be considered include the following:

1. Whether the attorney is an advocate in the case

In considering whether an attorney communication is likely to unduly influence a tribunal, one factor considered by courts is whether the attorney is in a position to appear to have insider information about a particular case, as would be the case if he or she were representing a party. E.G. Chicago Council of Lawyers v. Bauer, 522 F2d 242, Hdnt. 15 (7th Cir. 1975) (Disciplinary rule creating presumption attorney speech threatened trial process only applicable to attorney associated with government investigation.)

Non-lawyers and lawyers not representing litigants are generally given the benefit of the "clear and present danger" standard when sanctions are leveled at their public criticisms of the judiciary. See Wood v. Georgia, 370 U.S. 375 (1962) and ftnt. 5 at p. 1072 of Gentile.

Despite complainant's urgings (Brief, p. 19), the concept that lawyers are considered credible in regard to the legal system does not tend to establish that their speech is prejudicial to the administration of justice.

> "If the dangers of their speech arise from its persuasiveness, from their ability to explain judicial proceedings, or form the likelihood the speech will be believed, these are not the sort of dangers that can validate restrictions. The First Amendment does not permit suppression of speech because of its power to command assent. (Gentile at p. 1057)(Emphasis supplied)

2. Whether the possible prejudice is to a bench or jury trial

In Hirschkop v. Snead, 594 F2d 356 (4th Cir. 1979) the Court explains the different considerations operating in a bench trial:

> "Judges necessarily must consider evidence that has no direct bearing on the guilt or innocence of the accused. They must determine whether to suppress confessions and other evidence. When this evidence is excluded, they must nevertheless adjudge the accused to be guilty or innocent without considering the evidence which they have heard and held to be inadmissible. This record does not disclose what comments a lawyer could make about a pending case that would be more prejudicial than the information a judge must consider as he separates the wheat from the chaff during the course of an ordinary bench trial. It is unlikely that lawyers' comments could threaten the fairness of a bench trial, and this

> record does not indicate that they have. Moreover we cannot assume that such comments would influence a judge to make unfair rulings against either the accused or the state. The suggestion that such an inference could be drawn from publicity highly critical of a judge was rejected in Pennekamp v. Florida, 328 U.S. 331, 349 (1946)."

3. Whether the speech was public

Issues such as contamination of a possible jury venire or the undermining of public confidence in the legal system have very little relevance when the allegedly prejudicial attorney speech is not directed toward or made generally available to the public. Complainant's references in her brief to supposed underminings of public confidence are either completely unsupported (Brief, p. 18, 26) or refer to cases of attorney speech lambasting the judiciary (Brief, p. 22), which is not this fact situation.

4. Whether actual prejudice resulted

Many cases turn on a factual dispute as to whether prejudice to the trial process actually did or did not occur. The U.S. Supreme Court in Gentile (p. 1055) determined that the Nevada State Bar had failed to produce

> "a single example where a defense attorney has managed by public statements to prejudice the prosecution of the State's case . . . . the absence of anecdotal or survey evidence in a much-studied area of the law is remarkable. The various bar associations and advisory commission reports which resulted in promulgation of ABA Model Rule of Professional Conduct 3.6 (1981), and other regulations of attorney speech, and sources they cite, present no convincing case for

restrictions upon the speech of defense attorneys."

5. Whether the proceeding involved is criminal

It is elementary that greater solicitude will be granted to protect Sixth Amendment concerns about the integrity of the trial process than to protect free speech where an individual's personal liberty is at stake.

The complainant is therefore left only with an argument consisting of speculation about the potential for prejudice. In support of its musings about such potential, complainant has propounded the rather troubling testimony of Judge Lee:

> "There is a danger that a judge might perceive it as a threat, give him some bad publicity, or to bad-mouth him, so to speak, around the town or around the country. And he might go ahead and decide their way, even though he might be leaning the other way, or might not be wanting to take such an extreme position that they've argued for.
>
> Or a judge, you know, I can see a judge reacting the other way, and saying, I'm not going to knuckle under them, to them, under any circumstances. And he might make a decision that might not be in the best interest of the child." (Tr. P. 188)

Even if this jaundiced view of the personal integrity of the judiciary were accurate, it would not serve as a justification to silence political speech. Respondent is not responsible for anyone's behavior except her own and cannot, consistently with due process or constitutional free speech protections, be

disciplined on the theory that a hypothetical judge might become irrationally defiant and make a decision that would hurt a child.

6. Whether the attorney speaker had reason to know of the likelihood of prejudice or was acting within Rule 3.6's "Safe Harbor" provisions

As has been noted previously, the Trial Panel's finding of a complete absence of prejudice to Judge Lee is amply supported in the record and is uncontroverted.

In part due to the extreme confusion (which still exists) on the part of attorneys representing clients involved in legal proceedings as to what could or could not be said, usually to the press, and the proliferation of caselaw holding that existing standard of degrees of likelihood of interference with a fair trial, were unconstitutionally overbroad (Chicago Council of Lawyers v. Bauer), unconstitutionally vague as applied to non-criminal non-jury trials (Herschkopf v. Snead) [sic], or otherwise unconstitutional abridgements of free speech (Matter of Keller 693 P2d 1211, 1214 (Mont. 1984)), states began adopting various versions of the ABA's Rule 3.6, which provides guidelines for lawyer speech.

Oklahoma's Rule 3.6 appears to remove a lot of the guesswork. The types of speech specifically enumerated in Rule 3.6(b) and (c), when expressed publicly, are presumed to be prejudicial to the administration of justice. Respondent is not aware of any claim that any statement in the SCAN letter can be considered to fall within any of the categories enumerated in 3.6(b) or (c).

Rule 3.6(d), also known as the "Safe Harbor" provision, specifically enumerates those kinds of information that a lawyer is free to disseminate. Rule 3.6(d)(6) permits a lawyer to state

> "a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest;"

The Comment to this portion of Rule 3.6 goes on to say that

> "there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security."

Aside from any issue as to whether any portion of Rule 3, including Rule 3.6(d), applies to respondent, respondent, even if she had been representing a litigant in Perry would have had a legitimate basis to express all of the concerns contained in the SCAN letter to news media, without fear of reprisal from the complainant bar association. That the audience for the SCAN letter consisted only of the litigants, their attorneys, and the judge, simply makes the argument stronger.

The United States Supreme Court considers it so important that attorneys should indeed be free to rely on such "Safe Harbor" provisions as are included in Oklahoma's Rule 3.6(d) and in the analogous Nevada rule referred to in Gentile, that it will not tolerate the sanctioning of attorney speech even where the attorney relies on "Safe Harbor" provision language so vague that a lawyer seeking to avail himself of its protections "must guess at its contours" (Gentile, p. 1048). Respondent's good faith belief in the availability of those protections is sufficient.

It may be appropriate at this point to note that the usage in the SCAN letter of variations of the term "caution" may have created a lot of misunderstanding with Judge Lee and/or with the complainant. Probably any ambiguity arises as a matter of one's perspective. From the perspective of the SCAN member signers, including respondent, notwithstanding complainant's unsupported contentions to the contrary (Brief, p. 27), the focus of the letter and the focus of their concern was obviously on the safety of the Perry child in particular and of other children in the community in general. (Tr. P. 225, p. 256 lines 19-23) Hence the letter spoke of "caution" in terms of child safety. On the other hand, it would seem that if one's focus is more on political insecurities or fear of bad press affecting one's career, then some of the various apparently non-sequitur misinterpretations of the SCAN letter's usage of the term "caution" as a "threat" or a warning that SCAN would strike out at the career of Judge Lee (Brief p. 26), become perhaps more understandable though not justified. This difference in perspective may be best exemplified by Complainant's reference in its brief at p. 18 to the Ryan Luke case. The brief appears oblivious to the urgency and concern expressed by the SCAN members, including respondent, about averting a tragedy, and re-characterizes the letter's Ryan Luke reference as intimidation. Complainant then goes on to suggest, perhaps unintentionally, that the real victims in the Ryan Luke case were the government workers involved. (Brief, p. 18)

Respondent had a good faith belief that the only effective manner in which she could warn the LeFlore County community about the behaviors of DHS and Youth Services workers, short of lacing her concerns with the media, was to place such grievances at the door of the judiciary, a body of government charged by law with protecting citizens' lives and liberty interests against highhanded or capricious official conduct operating under legal forms. Rich Hill Coal Co. v. Bashore, 7 A2d 302 (Pa. 1939)(Hdnt. 21). Even minors are constitutionally entitled to look to the judiciary for protection of their liberty interests. (Vann v. Scott,

467 F2d 1235 (7th Cir. 1972)(Hdnt 5)), though finding a means to do so can be very problematic for a minor caught up in a court proceeding in which he has no court-appointed attorney, no guardian ad litem, and no CASA. Respondent has repeatedly expressed concern not only that DHS or Youth Services improprieties could best be addressed by a judge sitting in the county where the issues arose and will be litigated, but also that

> "he's certainly in a position to know and should know about the quality of the work being done by DHS workers in his own county." (Tr. p. 282, lines 6-9) (Emphasis supplied)

Respondent submits that giving the tribunal an opportunity to have such information enhances the judge's abilities not only to assess evidence in the Perry case but also in future DHS cases in his county. Having more information at least available should add to, not subtract from, the administration of justice.

APPENDIX G
Text of Relevant Rules
and Constitutional Provisions

Oklahoma's Rules of Professional Conduct 8.4(d) and 3.6(d)(6), 5 Ok. Statues 1991, Ch. 1 App. 3-A, state as follows, respectively:

> "It is professional misconduct for a lawyer to:
> (d) engage in conduct that is prejudicial to the administration of justice"
>
> and
>
> "Notwithstanding paragraphs (a) and (b)(1-5) and (c), a lawyer involved in the investigation or litigation of a matter may state without elaboration
> . . .
>
> (6) "a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest;"

The First Amendment to the United States Constitution reads as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right to the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 1 of the Fourteenth Amendment to the Constitution of the United States, reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Supreme Court, U.S.
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(2)

No. 97-140

IN THE
Supreme Court of the United States
October Term, 1996

KATHERINE HINE,
Petitioner,

v

STATE OF OKLAHOMA EX REL.
OKLAHOMA BAR ASSOCIATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OKLAHOMA

BRIEF OF *AMICUS CURIAE*
ARCH, CHILD ABUSE FORENSIC INSTITUTE, ECLIPSE, HEAR MY VOICE, JUSTICE FOR CHILDREN, THE LINKUP,*
(*IDENTITY OF AMICI CURIAE CONTINUED ON NEXT PAGE)

Counsel for Amici Curiae
Richard L. Ducote
335 Decatur Street
New Orleans, Louisiana 70130
(504)581-5152

28 pp

(IDENTITY OF AMICI CURIAE, CONTINUED)
NATIONAL ALLIANCE FOR FAMILY COURT JUSTICE,
NATIONAL COMMITTEE FOR THE RIGHTS OF THE CHILD,
NATIONAL TASK FORCE FOR CHILDREN'S
CONSTITUTIONAL RIGHTS, INC., DR. HAL PIPINSKY, ROSS
COUNTY NETWORK FOR THE PREVENTION OF CHILD
SEXUAL ABUSE, SAVE, SNAP,
IN SUPPORT OF PETITIONER

QUESTIONS PRESENTED FOR REVIEW

1. Whether, without this Court's acceptance of certiorari, the precedential value of the Oklahoma decision below refusing to protect petitioner Hine's speech under the First Amendment, leaves serious questions of public importance as to the circumstances under which lawyer speech can ever reliably enjoy constitutional protection?

2. To what extent should this Court consider the hostile political climate in which petitioner's speech was subjected to punishment, and the probability that Oklahoma's Rule 8.4(d) was applied to her speech in a discriminatory manner, in assessing the compelling public importance of this Court setting clear constitutional standards for such regulations that continue to stifle public discourse about controversial or unpopular topics?

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2. This Court Should Accept Certiorari in Consideration of the Hostile Political Climate in which Petitioner's Speech was Subjected to Punishment, the Probability that Oklahoma's Rule 8.4(d) was Applied to her Speech in a Discriminatory Manner, and the Compelling Public Importance of this Court's Setting Clear Constitutional Standards for Such Regulations that Continue to Stifle Public Discourse about Controversial or Unpopular Topics. . . 13

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IDENTITY AND INTERESTS OF AMICI CURIAE

1. **Alliance for the Rights of Children** ("ARCH"), [formerly, Friends of Elizabeth Morgan] is a Virginia based 501(c)(3) organization committed to protecting children from abuse. Its president is Glennie Rohelier. ARCH's interest in the petition is in protecting the rights of child advocates to speak out on behalf of children at risk.

2. **The Child Abuse Forensic Institute** ("CAFI"), based in California, provides advocacy, referral, therapy, investigative, and training services for protective parents and legal professionals seeking expert direction in child abuse cases. CAFI's executive director is attorney Seth Goldstein. CAFI's interest in the litigation before this Court is its fear that the precedential effect of such decisions will cause professional child advocates to begin self-censorship.

3. **ECLIPSE (Emancipating Children from Legal Injustice, Pornography & Sexual Exploitation)**, based in South Carolina, is a national nonprofit corporation providing multi-disciplinary professional assistance in child abuse cases. Its president is Robert L. Millard. ECLIPSE's interest in this case is due to children's sole voice within the system being the one provided by advocates.

4. **Hear My Voice** ("HMV") is a national children's rights organization based in Michigan that seeks to promote the right of all children to have safe, permanent families. Its director is Marci R. Feinberg. Many attorneys and psychologists comprise HMV's Board of Directors or National Advisory Council. HMV's interest in this petition arises from its concern that attorneys and psychologists are being deterred from child advocacy activity.

5. **Justice for Children** ("JFC") is a national child advocacy organization with eleven chapters in nine states. JFC's president is attorney Randall Burton of Houston, Texas. JFC's concern in this case is that the speech of all child advocates, especially attorneys, will be chilled if the Oklahoma decision below is allowed to stand.

6. **The LINKUP, Survivors of Clergy Sexual Abuse, Inc.**, based in Illinois, with over 5,000 members, assists victims and promotes institutional prevention efforts. Its president is Thomas H. Economus. LINKUP has an interest in seeing that victims have a voice in the legal process.

7. **The National Alliance for Family Court Justice**, based in Virginia, is an organization directed to lobbying for abused children and legislative reform of court practices that are gender-biased or that adversely impact children. The national director of the Alliance is Elizabeth Richards. The Alliance's interest in this Court's grant of certiorari is that political speech on behalf of children, not be stifled.

8. **The National Committee for the Rights of the Child** is a coalition of other child advocacy organizations dedicated to establishing that children are "persons" under the U.S. Constitution. Its president is Ted Steege. NCRC includes many attorney participants and supports the petition due to its advocacy for constitutional protections for the voice of children in legal proceedings that affect them.

9. **The National Task Force for Children's Constitutional Rights, Inc.** is a multi-disciplinary organization founded by Connecticut Superior Court Judge Charles D. Gill and Dr. Anne Burgess in 1988. With membership in fifty states, the Task Force has appeared as amicus curiae in appeals in state and federal courts where the constitutional rights and interests of children are at stake. The Task Force has an interest in more fully demonstrating to this Court the need for granting review in this case to decide issues of compelling public importance involving the constitutional rights of those who advocate on behalf of children in the legal system.

10. **One Voice/ACAA("One Voice")**, based in Washington, D.C., is a national advocacy organization for abused children and adult child abuse survivors. The American Coalition for Abuse Awareness ("ACAA") is the public policy project of One Voice. The president of One Voice/ACAA is attorney Sherry Quirk. One Voice has an interest in this case based on its belief that open discussion of victim and children's issues will be thwarted when attorneys and therapists fear that their participation in honest dialogue will result in professional censure.

11. **Hal Pipinsky, J.D. and Ph.D., Professor of Criminology**, University of Indiana, has a professional interest in the rights of abused children and their non-offending caregivers and has served as an expert witness in child abuse cases. His interest in the petition is due to his concern that the voices of child advocates not be silenced.

12. **The Ross County Network for the Prevention of Child Sexual Abuse ("The Network")** is a 501(c)(3) Ohio-based child advocacy

organization which includes attorney board members. Its director is Portia Davis. The Network's interest in the petition is based on its concern that child advocates, particularly attorneys, are discouraged from speaking freely on behalf of child safety.

13. **Survivors and Victims Empowered** ("SAVE"), based in Pennsylvania, is a 501(c)(3) advocacy organization. Its director is L. Philip Sheldon Jr. SAVE has an interest in the safety not only of victims but of the right of others to advocate for them.

14. **Survivors' Network of those Abused by Priests** ("SNAP"), based in Illinois, is an organization whose goal is to assist survivors of clergy sexual abuse. SNAP's national director is David Clohessy. With support groups in eleven states, SNAP has an interest in promoting a freer public dialogue about the concerns of sexual abuse victims.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This brief is submitted in accordance with U.S. Supreme Court Rule 37, a consent letter from the petitioner's counsel of record being filed herewith, and a copy of the respondent's consent letter also being filed herewith, the original of which is being sent by the respondent to the U.S. Supreme Court Clerk under separate cover. The Amici, many of whom have attorney members and spokespersons, are concerned that those attorneys, as a result of the Oklahoma decision below, may now be subjected to discriminatory professional discipline and loss of licensing due to the application of broad, general, and vague regulations such as Oklahoma's Rule 8.4(d). Seven years ago this Court was called upon to place constitutional restrictions on a State's power to ban the public speech of criminal defense attorneys in *Gentile v. Nevada State Bar*, 501 U.S. 1030 (1991). Still unaddressed, and a matter of grave public importance, are the First Amendment restrictions that must be imposed on a State's ability to ban the unpopular but good faith speech of an attorney motivated solely by concern for child safety.

Attorneys and other professionals who advocate for children at a time of great political hostility to their efforts, are increasingly targeted for professional discipline, with widely varying results. Such professionals deserve to know that the First Amendment will protect

them at least as well as it does their right to engage in commercial speech. A citizen who has reason to believe she must report systemic child abuse, should not have to fear that her reliance on statutory immunity for such report is meaningless. The Oklahoma decision below leaves such assumptions open to question, resulting in the chilling of a broad variety of speech.

Hine v. Oklahoma Bar Association offers this Court the opportunity to clear up the confusion created by the Oklahoma Supreme Court decision below, to reassert the individual's First Amendment freedom to interpret "justice" in more than one officially sanctioned manner, and to reassure citizens that their political expressions will not have to be paid for by censure in their professional lives.

THE ARGUMENT

I. This Court Should Accept Certiorari to Rectify the Oklahoma Decision Below Refusing to Protect Petitioner Hine's Speech Under the First Amendment, so as to Resolve and Clarify Serious Questions of Public Importance as to the Circumstances under which Lawyer Speech can Reliably Enjoy Constitutional Protection[1].

A. *General disciplinary regulations prohibiting conduct that prejudices the State's then current concept of justice, require this Court's intervention and the setting of uniform constitutional guidelines.*

This Court has long observed the prejudice to the interests of justice that occurs when trial courts confuse "offenses to their sensibilities with obstruction to the administration of justice". *In re Little*, 404 U.S. 553, 555 (1972) (quoting *Brown v. United States*, 356 U.S. 148, 153 (1958)). Although

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[1] The within brief was not prepared by counsel for any party, but the petitioner participated in its preparation and covered the cost of printing.

> "the fair administration of justice requires that lawyers challenge a judge's purported impartiality when facts arise which suggest the judge has exhibited bias or prejudice"[2],

judicial sensibilities may understandably continue to be arguable topics of concern when a judge's impartiality or even his integrity is challenged. Such concerns have nonetheless been held not to justify lawyer criticism. E. g. *In re Sawyer*, 360 U.S. 622 (1959); *In re Snyder*, 472 U.S. 634 (1985).

What is not so understandable is that concern about judicial sensibilities has now been extended so that criticism of the conduct of *witnesses or others* is considered "prejudicial to the administration of justice" where the trial judge or the participating attorneys become sufficiently upset about the criticism.[3] The Amici submit that protecting not only First Amendment rights of attorney speakers but the interests of justice flowing from those rights, is difficult enough when the speech is critical of the judiciary. Courts have had problems with the breadth and generality of regulations such as Rule 8.4(d) for well over a century.[4] Such problems may be brushed aside where the offending conduct "has nothing to do with conscientious, but unpopular, opinions or ex post facto definitions of unethical behavior."[5] But the decision of the Oklahoma Supreme Court below has everything to do with conscientious but unpopular speech and must no longer be allowed to stand as precedent.

A growing body of citizens of every state now speak publicly about political issues or associate in organizations in which others, often lawyers, do so on their behalf. Aside from the massive and seemingly enduring public interest in children's issues, special

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[2] *United States v. Cooper*, 872 F2d 1, 3 (1st Cir. 1989)

[3] Judge Lee's testimony at p. 4e of the petitioner's Appendix speaks to the degree of "upset" that the judge and both attorneys experienced, evidently due to the SCAN letter's criticism of two local agencies.

[4] E.g. *Parker v. Levy*, 417 U .S. 733, 756 (1974); *Ex Parte Secombe*, 60 U.S. (19 How.) 9, 14 (1857)

[5] *In Re Gillard*, 271 N.W.2d 785, 809 (Minn. 1978)

interest groups, self-help groups, religious/political organizations and other groups wishing to make a difference in public policy, if only at the local level, are proliferating at a healthy rate[6].

The Oklahoma decision below casts doubt on such decisions as *Squire v. Pace*, 516 F2d 240 (1975), cert den. 423 U.S. 840 and *People v. Klick*, 66 Ill.2d 269, 362 N.E.2d 329(1977) where the First Amendment prohibited arbitrary prosecution of those who "annoy" others. It is no longer such a great leap for citizens to wonder whether disorderly conduct statutes or obstruction of justice regulations will again be imposed to suppress expressions of political opinion. After all, arguments may even be made that American citizenship itself, like the status of being a lawyer, is a privilege that carries responsibilities, one of which may include the foregoing of government criticism, if believed to be intemperate.

B. *Even under reduced constitutional standards, lawyer commercial speech has enjoyed greater constitutional protection than that afforded to petitioner Hine. The Oklahoma decision, if permitted to stand, ludicrously suggests that political speech is less constitutionally protected than is commercial speech.*

Although First Amendment protections have always been limited in the area of commercial speech, they are not insubstantial.[7] When state professional licensing boards have sought to ban certain commercial practices of members, this Court has often been skeptical of the State's claimed justifications, stating that even purely

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[6] E.g. Frances Moore Lappe and Paul Martin DuBois in *The Quickening of America* [Jossey-Bass Inc., San Francisco, 1994] describe and offer assistance to what Henry Cisneros, Secretary of HUD refers to as "a new practice of democracy as *citizen problem-solving* - in our schools, communities, and workplaces". *Quickening* lists over a hundred grassroots organizations, many of which, like the Center for Community Change, the Maverick Institute, and the National Issues Forum, exist exclusively to teach other organizations how to promote public dialogue and participatory democracy.

[7] Even a trial lawyers' boycott aimed solely at forcing the government to increase attorney compensation was protected under the First Amendment in *Superior Court Trial Lawyers Asso. v. FTC*, 875 F2d 226 (App.D.C., 1988)

commercial advertising "serves individual and societal interests in assuring informed and reliable decisionmaking".[8] Citing *Kleindienst v. Mandel*, 408 U.S. 753, 762-763 (1972), this Court particularly emphasized that the First Amendment protects the public's reciprocal right to receive the commercial information the speaker has the right to express. [*Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748, 757 (1976)]

In *Bates v. State Bar of Arizona*, 433 U.S. 350, 375 (1977) this Court observed that there were other perspectives on the meaning of justice than those of the organized bar, and rejected the Arizona Bar's argument that lawyer advertising would improperly stir up litigation. The *Bates* Court reasoned further that the expectation of advertising-driven increases in accessibility of legal services to previously underserved portions of the population strengthened the disciplined attorneys' First Amendment argument because the resultant stimulus to "collective activity undertaken to obtain meaningful access to the courts"[9] was a matter deserving of significant constitutional protection. Petitioner's SCAN letter not only encouraged First Amendment protected petitioning activity but itself constituted collective petitioning activity lying at the core of the First Amendment, a fact completely ignored by the Oklahoma court below.

At a time when information is exploding about child abuse and its many subtopics, often spanning several disciplines, legislation is being called for to require judges to learn more about many of the same topics contained in the SCAN letter.[10] Mandatory judicial

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[8] *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977). One would think that judges are included in the category of persons who not only can benefit from a free exchange of ideas and information, but who also do not need to be insulated from hearing unpleasant information when unsophisticated consumers need no such "protection".

[9] *Bates* at p. 376, footnote 32 of the opinion.

[10] State of the art information about such topics as children's susceptibility to coercion, and family reunification, is constantly changing. Keeping abreast of the most accurate information available, or at least knowing enough to be able to properly evaluate the expert witnesses is crucial for any judge who is addressing litigation involving abuse allegations.

training is being legislated, primarily due to a wave of public sentiment expressed to Congress and state legislatures calling for increased training in the new information.[11]

Since *Virginia Pharmacy Board* and *Bates*, this Court has set out with more specificity, the elements of the intermediate scrutiny framework for assessing restrictions on purely commercial speech. Even to regulate commercial speech, the State must prove that the regulation is narrowly drawn and materially advances the State's stated interest.[12] Rule 8.4(d), however, is anything but narrowly drawn, apart from whether it is void for vagueness. Even had the SCAN letter been sent for pecuniary motives, which it clearly was not,[13] the limited protections of the *Central Hudson* test would have still precluded the Oklahoma Bar Association from banning the letter.

The Amici believe that this Court has a fundamental concern, expressed in its later lawyer commercial speech cases, that lawyers temper their "selfish pursuit of economic success by adhering to

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[11] Following the 1995 murder of two year old Ryan Luke, after he had been judicially identified as at risk, Oklahoma enacted 10 Ok. St. Sec. 1211, requiring judicial training in child abuse and neglect. The August 6, 1992 testimony of attorney Joan Pennington to the Judicial Committee of the U.S. House of Representatives described the then urgent need for training, noting that judges do not grasp the extent of child sexual abuse, tend to villify parents who believe their children's disclosures about child sexual abuse, and deny meaningful opportunities to present evidence in support of the child's allegations. Some concerns about lack of judicial training are being addressed by such curricula as the one created in late 1996 as a joint project of the NOW Legal Defense and Education Fund in cooperation with the National Association of Women Judges and the American Bar Association Center on Children and the Law, entitled "Adjudicating Allegations of Child Sexual Abuse When Custody is in Dispute". At the trial court level, often in rural counties, however, practices such as Judge Lee's failure in the Perry case to appoint an attorney, guardian *ad litem*, or CASA for the allegedly abused child, though required under federal statute[42 U.S.C. Sec. 5106a(b)(2)(A)(ix)], are all too common.

[12] *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557, 564-565 (1980)

[13] See p. 8a of Ok. Sup. Ct. decision below, App. A, pet./cert.

[higher] standards of conduct".[14] In her dissenting opinion in *Shapero*, Justice O'Connor focused on the Court's two major concerns in looking at why lawyers are regulated at all, and noted the twin evils of (1)overzealous representation of a client, and (2)abuse of the client for the lawyer's benefit.[15] Neither is a concern with this petitioner. Out of concern for the many opportunities for misconduct, members of this Court have urged lawyers to aspire to the goal of voluntary public service, "a goal that transcends the accumulation of wealth."[16] Broad and unclear *bans* on voluntary public service such as those imposed below, hardly promote any legitimate goals for the profession or the administration of justice.

C. *Where a citizen has reasons to expect that her conduct is protected not only by the First Amendment but also by child abuse reporting statutes, the punishment of such citizen's speech chills the speech of all other citizens.*

One measure of safety a lawyer can perceive she has in a profession in which broad, general regulations such as 8.4(d) are in effect, occurs when statutes are in place that promise immunity. Nonetheless there has always been an uneasiness among citizens about reporting child abuse.[17] This uneasiness goes back to the time

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[14] *Shapero v. Kentucky Bar Assn.*, 486 U.S. 466, 488 (1988).

[15] *Shapero* Id. at p. 489

[16] *Shapero* Id., at p. 489.

[17] It is well accepted that the

> "voluntary reporting of suspected cases to community authorities has been inhibited by many factors. . . Neighbors and friends hesitate to make accusations. An abusive father or mother, facile with explanations, often escapes discovery. . . Some physicians have regarded reporting as a breach of the special confidential relationship between physician and patient, and still others have failed to report either because they did not know to whom to report, or because they had no reason to believe that reporting would result in benefit to the child." Paulsen, M. "The Legal Framework for Child Protection", 66 Columbia L. Rev. 679, 710 (1966)

of Freud and even earlier[18], and has persisted at least until the time of professional recognition of the Battered Child Syndrome in 1962.[19]

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[18] Masson and others have told the story of Freud's turn of the century recognition of the prevalence of childhood sexual abuse in his patients and his subsequent abrupt change of attitude. Masson, J. *The Assault on Truth: Freud's Suppression of the Seduction Theory.* Farrar, Strauss, & Giroux, Hew York , 1984. Herman, J. *Father-daughter Incest* . Harvard University Press, Cambridge & London, 1981. Summit, R. "Hidden Victims, Hidden Pain: Society's Avoidance of Child Sexual Abuse." In G.D. Wyatt & G.J. Powell (Eds), *Lasting Effects of Child Sexual Abuse.* (pp. 39-60). Sage Publications, Newbury Park, CA. 1988. When he announced his "childhood seduction" theory to the psychoanalytic establishment of Vienna, Freud's psychoanalytic colleagues threatened to destroy him professionally. [Masson (1984)]Freud then aligned his thinking to conform to that of his colleagues, transforming his "childhood seduction" theory into one in which the responsibility for incestuous longings would fall squarely on the shoulders of the child, and in which actual adult-child sexual interaction became merely a childish fantasy. Ferenczi, one of Freud's students, insisted that the original theory was correct and based his lifework on that assumption. E.g. Ferenczi, S. "Confusion of Tongues Between Adults and the Child: the Language of Tenderness and Passion". In M. Balint (Ed.) *Final Contributions to the Problems and Methods of Psycho-analysis* (pp. 156-167), Hogarth Press, London (1955). Freud joined his colleagues in casting aspersions not only on Ferenczi's professionalism, but his sanity. (Masson, 1984, p. 152). Dr. Karel Pyck, Chair of the Department of Child and Adolescent Psychiatry, University of Leuven, Belgium, reports that forensic writings concerning child sexual abuse date back to the 1550's and 1560's in France, but that cycles of professional retaliation have repressed such information for centuries. ARCH (Alliance for the Rights of Children) Newsletter, Summer, 1993, p. 5.

[19] Professional silence about child abuse was dramatically shattered with the publishing of "The Battered-Child Syndrome". [Kempe, Steele, Silverman, Silver and Droegemueller, JAMA, July 7, 1962] Previous work by other physicians had raised the issue of there being a curious link between multiple fractures of the long bones and chronic bleeding under the skull, which in turn lead to much speculation about how leg fractures could be a complication of subdural hemorrhaging. Few had dared to look to traumatic causation. [*See* Siegel, B., pp. 202-212, *A Deat' in White Bear Lake*, Bantam Books, 1991, New York] Kempe and his colleagues did dare to draw the obvious conclusions, noting in the article that

By the late 1960's virtually every state had enacted legislation *requiring* physicians to report child abuse, generally with criminal sanctions for failing to report merely suspected abuse.[20]

However, the early child protection agencies were then, and are said to be now, "patchwork systems of blurred responsibility, often based on vague and superficial considerations".[21] In recognition of the growing problem of children suffering further injury and even death after having been identified by a child protection agency,[22] Congress passed the Child Abuse Prevention and Treatment Act in 1974.[23] Section 4(b)(2) of the Act provided, in part, that as a condition for receiving federal assistance each State would be required to enact legislation mandating immunity for reporters.

It is important to note that the federal act originally standardized the definition of "child abuse and neglect" to be

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> "[t]he battered-child syndrome is a term used by us to characterize a clinical condition in young children who have received serious physical abuse, generally from a parent or foster parent . . . It is a significant cause of childhood disability and death. Unfortunately, it is frequently not recognized or, if diagnosed, is inadequately handled by the physician because of *hesitation to bring the case to the attention of the proper authorities.*" [Emphasis supplied]

[20]Besharov, D. "The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect", 23 Villanova L. Rev. 445, 465-466 (1978)

[21] Besharov, D. Id. at p. 459; Judge Charles Gill likewise noted that in his home state of Connecticut "[i]t is conceded that sixty percent of such calls [regarding child abuse] are not afforded any response" and "[n]ot only are child abuse and neglect wrong, but the nation's lack of an effective response to them is also wrong. Neither can be tolerated. Together they constitute *a moral disaster.*"[Gill. C. "Essay on the Status of the American Child, 2000 A.D.: Chattel or Constitutionally Protected Child-Citizen?", 17 Ohio Northern L. Rev. 543, 552, 555 (1991)]

[22] Several empirical studies reveal that between 30% and 50% of children dying from abuse were already known by the Child Protection System to be at risk. *See* Berliner, L. and Gelles, R. "Is Family Preservation in the Best Interest of Children?" 8 J. Interpersonal Violence 556, 560 (Dec. 1993).

[23] 42 U.S.C. Sec. 5101-5106

> "the physical or mental injury, sexual abuse, negligent treatment, or maltreatment of a child under the age of eighteen *by a person who is responsible for the child's welfare* under circumstances which indicate that the child's health or welfare is harmed or threatened thereby."[24]

Under this definition, given the testimony of the Perry child's therapist, Linda Palmer, [Pet. Cert. App. E] and others given at petitioner's trial, the conduct of the county agencies involved in investigating the Perry child's alleged abuse and implementing the supervised visitation order, unequivocally appears to meet the federally standardized definition of abuse or neglect.[25] The fact that the abuse or neglect of the Perry child was at the hands of the government agencies did not "exempt or prohibit" petitioner Hine from reporting in good faith to Judge Lee.[26]

Petitioner had every reason to believe her act of reporting the suspected mistreatment of the child *within the child protection system* was not only permitted, but mandated by state law.[27]

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[24] 42 U.S.C. Sec 5106g(4).

[25] The Committee on Labor and Human Resources reported in July, 1995 that "child protective systems (CPS) are routinely placing children in jeopardy" and quoted the U.S. Advisory Board's 1990 report entitled "Critical First Steps in Response to a National Emergency" as stating in reference to the CPS that 'the safety of children cannot be ensured. Indeed, the system itself can at times be abusive to children'. Report No. 104-117 to Accompany S. 919, 104th Congress, 1st Session, Calendar No. 149, legislative day, July 10, 1995, pp. 2-3.

[26] *See* 10 Ok. St. Sec. 846(G). 10 Ok. St. Sec. 7105 seemed to provide Hine and others with

> "immunity from any liability, civil or criminal, that might otherwise be incurred or imposed. Any *such participant shall have the same immunity with respect to participation in any judicial proceeding* resulting from such report." [Emphasis supplied]

[27] 10 Ok. St. Sec. 846(A)(1)(d) renders all "other person[s]", i.e. persons other than physicians, nurses, and teachers named in Sec. 846(A)(1)(a)-(c), mandated reporters.

If the Oklahoma decision below continues to stand, it can be anticipated that citizens who suspect child abuse perpetrated by an individual or an institution, will again fear retribution for reporting.[28]

II. This Court Should Accept Certiorari in Consideration of the Hostile Political Climate in which Petitioner's Speech was Subjected to Punishment, the Probability that Oklahoma's Rule 8.4(d) was Applied to her Speech in a Discriminatory Manner, and the Compelling Public Importance of this Court's Setting Clear Constitutional Standards for Such Regulations that Continue to Stifle Public Discourse about Controversial or Unpopular Topics.

A. *Control of the media by the anti-child protection backlash has unduly influenced the legal profession.*

It is common and usual for any reform movement, after it achieves a certain measure of public support and sympathy, to be subjected to an opposition movement, which will be referred to in the context of the child protection movement,' as "the Backlash".[29] Backlash movements generally, as is true of the anti-child protection movement, present themselves as not being opposed to the publicly accepted goals of the reform movement. After all, it is difficult

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[28] Fear and the consequent chilling effect that it produces upon speech need not be rational to be effective at silencing child abuse reports.

> "Fear of being sued unjustly for libel, slander, defamation, invasion of privacy, and breach of confidentiality is frequently cited as a deterrent to more complete reporting. [Citations omitted] This fear exists even though applying existing legal doctrines leads to the conclusion that anyone making a legally mandated or authorized report would be free from liability so long as the report was made in good faith. 'The point is that the common law and all of our decisional authority already confers such immunity, and *there is no American case that even suggests that there may be liability for a good faith report of the kind required by battered child statutes*.'"
> [Besharov, D. at p. 475. (Ftnt. 20 *Supra)*]

[29] Myers, J. (Ed.) *The Backlash.* Sage Publications, Thousand Oaks, 1994.

politically to publicly oppose the concept of child protection. The posture of the Backlash movement is that it is not the "goals" of the reform movement that are opposed, only its "methods". [30]

And so it has been with child protection. With the fanfare that accompanied Kempe's Battered Child Syndrome and then Roland Summit's Child Sexual Abuse Accommodation Syndrome[31], the public, the news media, and even the legal system, seemed by the mid-eighties to be prepared to receive and process increasing numbers of newly mandated disclosures of child abuse. Funds became available, to a certain extent, for studies of the issues, though in amounts inadequate to deal with the annually geometrically increasing wave of child abuse reports.[32]

While the child protection system of the 1980's was ill-equipped to fulfill its mandate,[33] by 1991 more than 80 percent of news coverage about child sexual abuse was weighted toward stories of survivors and the nature of childhood trauma.[34] By 1994,

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[30] Conte, J. "Child Sexual Abuse: Awareness and Backlash", pp. 224-233, Vol. 4, The Future of Children, Summer/Fall, 1994.

[31] Summit, R. "The Child Sexual Abuse Accommodation Syndrome", 9 Child Abuse & Neglect, pp. 177-193 (1983)

[32] Reports of children suspected of being abused or neglected increased twenty-fold from 1963 to 1993, from approximately 150,000 to 3 million. See Report 104-117 from Note 23 *supra*, at p. 13.

[33] Major cuts in social service funds in the 1980's left few resources for personnel and training opportunities needed for effective prosecution, other than though a few such enactments as the Children's Justice Act of 1986 and NCCAN. *Joint Investigations of Child Abuse: Report of a Symposium*, U.S. Dept./Justice Office of Justice Programs, July, 1993. Alice Vacchs' *Sex Crimes*, Owl Books, New York, 1994; reported at p. xi that the United States Judiciary Committee's "Violence Against Women: The Response to Rape: Detours on the Road to Equal Justice", based on 1990 statistics, found that 98% of rape victims never saw their attacker caught, tried and imprisoned. It is estimated that some 61% of rape victims are children. National Victim Center and the Crime Victims Research and Treatment Center, *Rape in America. A Report to the Nation*, April 23, 1992, pp. 1-16.

[34] University of Michigan sociologist Katherine Beckett's 1996 study of media portrayals of child sexual abuse in four national magazines [Time, People,

following the 1992 organization in Philadelphia of a support group for parents accused of sexually abusing their children[35], more than 80 percent of news coverage in the same publications focused on false accusations and the newly coined concept of "false memory".[36]

Despite the continuing escalation of child abuse reports in all states, the sophisticated strategies of the False Memory Syndrome Foundation began to have a substantial impact on media portrayals of child abuse, particularly child sexual abuse. There are said to be at least 247 articles about the FMSF or its founders, in such national newspapers and magazines as USA Today, The Washington Post, The Baltimore Sun, The Chicago Tribune, The Los Angeles Times, The Dallas Morning News, Newsweek, Time Magazine, and Psychology Today.[37] Television programs sympathetic to the Backlash and to

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Newsweek, and U.S. News & World Reports] is described in Mike Stanton's "U-Turn on Memory Lane"; Columbia Journalism Review, pp. 44-49, July/August, 1997.

[35] Id. Pamela and Peter Freyd, privately accused of child sexual abuse by their adult daughter, Dr. Jennifer Freyd, in 1990, formed the False Memory Syndrome Foundation ("FMSF") as part of a public campaign ostensibly challenging the validity of recovered memories of sexual abuse which had been suppressed in a form of "traumatic amnesia" .

[36] *See* ftnts 34 and 35 *supra.*

[37] The FMSF is the primary Backlash organization, but other groups have preceded or spun off from it, including VOCAL (Victims Of Child Abuse Legislation), and the Children's Rights Council. Although not formally affiliated with the FMSF, such organizations as NAMBLA (North American Man Boy Love Association) and a Newsletter entitled "Uncommon Desires" [published by New York attorney Lawrence Stanley according to New York Daily News Staff Writer Gene Mustain], openly espouse the de-criminalization of sex between adults and children. Prominent FMSF spokesman Ralph Underwager has publicly endorsed the professionalism of the NAMBLA publication Paidika. He was quoted in that publication as agreeing that pedophilia was "a responsible choice for the individual". Paidika: The Journal of Pedophilia, pp. 2-12, 3 Vol. 3, Winter (1993). FMSF Board member Hollida Wakefield was quoted at p. 12 of the same article: "It would be nice if someone could get some kind of big research grant to do a longitudinal study of, let's say, a hundred twelve-year-old boys in relationships with loving paedophiles."

those referring to themselves as falsely accused, have appeared regularly on such national news programs as Turning Point[38], Frontline, Good Morning America, and National Public Radio.[39]

The rising influence of the Backlash in the popular media has been paralleled in seminars and other continuing legal education materials, including several in Oklahoma.[40] Not surprisingly, this country began to see increasing numbers of decisions in which the

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[38] ABC's Turning Point has produced several documentaries, the latest of which ["When Children Accuse: Who to Believe?] broadcast on July 24, 1997, took the position that many prosecutions resulting in convictions for child sexual abuse, are based on evidence manufactured by over-zealous therapists and prosecutors. Convicted defendants were portrayed as the true victims. The Turning Point series of programs include in-depth interviews of alleged victims only if they had recanted, a not unusual phenomenon for bona fide victims of parental abuse.

[39] *Freyd v. Whitfield*, D.C. Md., No. L-96-627 Memorandum opinion of Judge Benson Everett Legg entered July 18, 1997, at p. 2.

[40] FMSF spokespersons Underwager and Wakefield presented a "Child Abuse Sex Crimes Seminar" in Oklahoma City, Ok. October 26, 27, and 28, 1995, attendance at which entitled Oklahoma attorneys to continuing legal education credit from the Oklahoma Bar Association. Underwager's 1995 Vita claimed presentations to at least twelve attorney associations between 1987 and 1995 in the states of Minnesota, Florida, Iowa, Mississippi, Wisconsin, Kentucky, North Dakota, New York, Tennessee, North Carolina, Indiana, and Nebraska, as well as in Australia, apart from numerous presentations to media, law enforcement, and legislative bodies.

By the mid-1990's Oklahoma's Family Law Journal, a publication of the Oklahoma Bar Association's Family Law Section, when it contained articles concerning child sexual abuse, included primarily articles slanted toward the Backlash. E.g. Call, J. "False Allegations of Sexual Abuse in Custody and Visitation Disputes", 9 Ok. Fam. L. J. 76 (Nov. 1994); Adams, J. "Child Abuse Reporting Laws: Recent Controversies", 10 Ok. Fam. L. J. 61 (June, 1995). As in other states, Oklahoma decisions by the mid 1990's at all levels began to reflect a willingness to award custody to those accused of child sexual abuse. E.g. *Kahree v. Kahree*, 66 O.B.J. 3771 (Ok. 1995); *Matter of R.L.S.*, 65 O.B.J. 2829 (Ok. App. 1994)

validity of children's accusations of sexual abuse was discounted.[41] Part of the rationale of many of such decisions included the characterization of children's therapists as unethical.[42] Although not targeted to anywhere near the extent of children's therapists, attorneys associated with child protection have increasingly come to be subjected to defamation suits, Rule 11 sanctions, and bar disciplinary proceedings, as has been petitioner Hine.[43]

B. *The political climate created by the Backlash and its extraordinary efforts to silence its critics must be fully considered in assessing the potential for discriminatory applications of Rule 8.4(d)*

When this Court last considered the issue of First Amendment protection for attorneys charged under imprecise disciplinary regulations such as Oklahoma's 8.4(d), Justice Kennedy's opinion paid particular attention to the potential dangers of discriminatory enforcement.[44] In *Gentile* the inquiry was of particular relevance because of the unusual susceptibility of the criminal defense bar, due to its constant position of criticizing government. Attorney Hine is likewise a member of a group, consisting of professionals who advocate vigorously for children, that is demonstrably susceptible to such potential discrimination.

The Backlash has been remarkably successful in its strategies of shifting the focus from child victims to the allegedly falsely

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[41] E.g. *Morgan v. Foretich*, 846 F2d 941 (4th Cir. 1988) and cases described in Summit, R. "Too Terrible to Hear", March 13, 1987 revision of paper in support of testimony before the U.S. Attorney General's Commission on Pornography, Miami, FL., November 20, 1985, available through Harbor-UCLA Med. Ctr., D-6, 1000 W. Carson, Torrance, CA. 90509; and in Rotondo, S. "Who's Protecting Whom?", (pp. 6-9)Body Memories, Berkeley, CA. Spring, 1995

[42] E.g. *Kahree v. Kahree*, at ftnt 38 *supra; See also Sullivan v. Cheshier*, 846 F.Supp. 654 (N.D. Ill. 1994); *Ramona v. Isabella*, No. 61898 (Cal. Super. Ct. May 13, 1994)

[43] See ftnts. 45-48 *infra*.

[44] *Gentile v. State Bar of Nevada*, 501 U. S. 1030, 1051 (1991)

accused, as well as in its primary objective of influencing media coverage.[45] Successful FMSF techniques also include congressional lobbying, public lectures, scientific conferences, on-line discussion groups, a newsletter, an 800 number, the picketing of therapists' homes[46], defamation suits[47], and grievances against troublesome attorneys.[48]

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[45] Stanton article, at ftnt. 31 *supra*, p. 47 quoting Katherine Beckett.

[46] Freyd v. Whitfield, Id. at p. 2

[47] Aside from the defamation suit against trauma expert Whitfield, a series of suits have been filed against HBO, Inc. and others, including an attorney commentator, due to a documentary critical of the role of the Houston judiciary in child sexual abuse cases [Huckabee v. HBO, Inc., No. 93-00116, Harrison v. HBO, Inc., No. 93-052010, and Hebert v. Grant, No. 93-041705, 127th Jud. Dist. Ct./Harris County, Texas; the first two suits are now on appeal in Ct./App. 14th Jud. Dist, Houston, Tx., as Case Nos. 14-96-01528-CV and 14-96-01529-CV, respectively] Lawsuits and picketing of therapist and newsletter editor David Calof caused serious interruption of the publication of Treating Abuse Today. The problem of rising numbers of suits against therapists who hear the disclosures of adult survivors, in which increasingly novel theories are used in support, are described in Bowman, C.. and Mertz, E. "A Dangerous Direction: Legal Intervention in Sexual Abuse Survivor Therapy", 109 Harvard L. Rev. 549, Jan. 1996.

FMSF psychologists Ralph Underwager and Hollida Wakefield sued psychologist and researcher Dr. Anna Salter and ten other entities, including the National Center for Prosecution of Child Abuse and several attorneys, for defamation in ***Underwager v. Salter***, 22 F3d 730 (7th Cir.1994). The Court of Appeals affirmed the grant of summary judgment to the defendants, ruling that Underwager and Wakefield would not be allowed to

> "silence those who hold divergent views, no matter how adverse those views may be to plaintiffs' interests. Scientific controversies must be settled by the methods of science rather than by the methods of litigation." (P. 736 of opinion)

[48] Joan Pennington Id. reported to Congress concerning the disbarment of Garnett Harrison in Mississippi because a mother she was representing was incarcerated until she revealed the names of those who had helped her hide her children. In divulging this information she implicated her attorney. Harrison denied knowing the children's location. *Newsome v. Newsome*, 557 So.2d 511 (1987). Pennington also testified concerning attorney Alan Rosenfield, an attorney and child advocate in New Hampshire, whose license

Such tactics, taken as a whole, are reminiscent of earlier periods in the history of this Court's championing of First Amendment rights. It was certainly not in a vacuum that Dirk DeJonge was prosecuted for speaking at a Communist Party meeting in protest of local jail conditions. *DeJonge v. State of Oregon*, 299 U.S. 255 (1937). This Court, though not specifically speaking to discriminatory enforcement, clearly considered the volatility of the often overzealous anti-Communist sentiment prevalent in this country when it enforced the First Amendment not only in *Delonge* but again when protecting the speech of an attorney so frustrated with the elusive process of defending persons charged under the Smith Act that she publicly questioned the integrity of the trial process. *In re Sawyer*, 360 U.S. 622 (1959). This Court again considered the political context of attempts to discipline NAACP lawyers in the 1960's and permitted those lawyers the protections of the First Amendment.[49]

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was suspended due to advice he gave a client about a judge's contemplated reaction in the event she ran to protect her abused child.

In a recent case very similar to petitioner's, Woody Allen, whose sexual abuse defense was conducted in large part by the FMSF, brought a grievance against prosecutor Frank Maco, due to press conferences and a faxed letter sent to judges presiding over the Mia Farrow/Woody Allen custody/visitation proceedings. On July 17, 1997, following several years of disciplinary proceedings in which prosecutor Maco, like petitioner Hine, had been charged with violations of Rule 8.4(d) [conduct prejudicial to the administration of justice], a Connecticut Statewide Grievance Committee voted twelve to one to dismiss the complaint. *Allen v. Maco*, Grievance Complaint No. 93-0322. Paralleling the testimony of Dianna Carroll in the case at bar, [App. E, pet/cert, p. 11e] Joan Pennington's Congressional testimony observed that Backlash lawsuits against professionals

> "rarely win, however it is still costly to defend a court action even when you are innocent. In addition, this type of strategy has a chilling effect on all of those who would like to help the protective parent, but are afraid of the of expense of defending in a civil lawsuit."

[49] E.g. *NAACP v. Button*, 371 U.S. 415 (1963).

A full consideration of the hostility of the political climate toward child advocates will lead this Court to conclude that the vagueness and overbreadth of Rule 8.4(d) nourished the potential, if not the actuality, of discriminatory application of the rule to the petitioner so as to silence voices seeking to speak for children in a way that has become unpopular with the Backlash influenced orthodoxy.

III. CONCLUSION

When a lawyer is punished for speaking as a citizen about timely political topics of grave public interest and concern, and a State court of highest resort does not even acknowledge that the First Amendment is involved, it is incumbent upon this Court to review the limits on a State's power to apply broad, general regulations that stifle unpopular political speech. The Amici join in requesting this Court to review the decision of the Oklahoma Supreme Court below.

Respectfully submitted,
Amici Curiae

Richard L. Ducote Esq.
335 Decatur Street
New Orleans, Louisiana 70130
(504)581-5152